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Title: William P. Barr, Attorney General, et al., Petitioners
v.
Catholic Social Services, Inc., et al.

Docketed:
May 13, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Schey,Peter A.

Single CA judgment. 2nd USDC is CD Calif also 40 copies of appendix 40 reprinted copies of pet rec'd 051492

Entry	Date	Note	Proceedings and Orders
1	May 13 1992	G	Petition for writ of certiorari filed.
2	May 13 1992		Appendix of petitioner William Barr, Atty. Gen. filed.
3	Jun 3 1992		DISTRIBUTED. June 19, 1992
4	Jun 3 1992	X	Brief of respondents Center for Human Rights and Constitutional Law, et al. in opposition filed.
5	Jun 11 1992	X	Reply brief of petitioner William Barr, Attorney General filed.
6	Jun 22 1992		Petition GRANTED.
			**********
7	Aug 6 1992		Brief of petitioners Barr, et al. filed.
8	Aug 6 1992		Joint appendix filed.
9	Aug 6 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
10	Aug 19 1992		Record filed.
		*	Original proceedings United States District Court for the Eastern District of California (3 Boxes)
12	Aug 21 1992		Order extending time to file brief of respondent on the merits until September 20, 1992.
13	Sep 21 1992		Brief amicus curiae of American Bar Association filed.
14	Sep 21 1992		Brief of respondents Catholic Social Services, et al. filed.
15	Sep 21 1992		Brief amici curiae of Chicago, et al. filed.
16	Sep 21 1992		Brief amici curiae of ACLU, et al. filed.
17	Sep 21 1992		Brief amici curiae of Church World Service, et al. filed.
18	Oct 22 1992		Reply brief of petitioner filed.
19	Nov 20 1992		SET FOR ARGUMENT MONDAY JANUARY 11, 1993.(2ND CASE).
20	Nov 23 1992		CIRCULATED.
21	Jan 4 1993		LODGING consisting of two unreported INS administrative decisions received from counsel for the respondents and distributed
22	Jan 7 1993		LODGING consisting of nine copies of INS Manual received from Solicitor General and distributed.
23	Jan 11 1993		ARGUED.

1pp

No. 91-1826

Supreme Court, U.S.
FILED
MAY 13 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the district courts properly entertain these lawsuits brought by aliens seeking adjustment of status, which challenge the Immigration and Naturalization Service's regulations articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering the Immigration and Naturalization Service to extend that deadline?

PARTIES TO THE PROCEEDINGS

Respondents in the first case are Catholic Social Services, Inc.; National Center for Immigrant Rights, Inc.; United-California Mexican American Associations; American Federation of Labor-Congress of Industrial Organizations; United Farm Workers of America, AFL-CIO; La Communidad de San Juan; Sara Orantes de Palacios, Mercedes Aguilar de Lopez; Maria Teresa Reyes; Jose Guerroero Saravia; Efren Gonzales; Lorenza Sanchez Benuto; Carlos Alberto Medina; Benjamin Chavez; Sergio Will; Eva Garcia de Soto; and Petra Estrada de Vasquez.

Respondents in the second case are League of United Latin-American Citizens; American G.I. Forum; Hermandad Mexicana Nacional; Los Angeles County Federaltion [*sic*] of Labor, Legalization Assistance Project (AFL-CIO); United California Mexican-American Association; International Institute (San Francisco); John Doe; Raul Berumen-Flores; Martha Berumen; Mario Villa; and Martin Nava.

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No.

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

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IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Attorney General and the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 956 F.2d 914. The opinions of the district courts (App. 22a-28a, 40a-49a, 50a-60a) are

unreported. A related opinion of the district court in the first case is reported at 685 F. Supp. 1149.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a is set out in the appendix (App. 99a-119a).

2. 5 U.S.C. 702, 703, and 704 are set out in the appendix (App. 120a-121a).

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency, by permitting aliens to apply to INS to adjust their status to that of an alien lawfully admitted for temporary residence. See 8 U.S.C. 1255a. The statute set out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); and (3) admissibility to the United States as an immigrant. 8 U.S.C. 1255a(a)(2)-(4).

A key concern of IRCA was to ensure that the adjustment program proceeded in an expeditious manner. Accordingly, the fourth condition for eligibility,

set forth in Section 1255a(a)(1), limited relief to aliens who applied during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] Section 1255a(f) also set forth detailed and exclusive provisions for judicial and administrative review of adjustment determinations. First, paragraph (1) of Section 1255a(f) provides that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (2) provides that there will be no review whatsoever for a denial "based on a late filing of an application." Third, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review."[2] Finally, paragraph (4) provides that judicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]."[3]

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[1] The Attorney General designated the twelve-month application period to begin on the last day possible, May 5, 1987, continuing through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

[2] The initial authority to evaluate applications has been delegated to the directors of INS's regional processing facilities. 8 C.F.R. 103.1(t). Pursuant to 8 C.F.R. 103.1(f)(1)(xxvii), 245a.2(p), the decision of the regional processing facility may be appealed within thirty days to the Associate Commissioner, Examinations (Administrative Appeals Unit).

[3] Pursuant to 8 C.F.R. 242.8(a), the initial authority to determine deportability lies with immigration judges. The alien may appeal to the Board of Immigration Appeals under 8 C.F.R. 242.21. Finally, under 8 U.S.C. 1105a, the alien may appeal the decision of the Board of Immigration Appeals to the appropriate regional court of appeals, in accordance with the provisions of 28 U.S.C. 2342-2350. See 8 U.S.C. 1105a

2. This petition involves two consolidated cases challenging two different INS regulations interpreting the statutory requirements for eligibility for adjustment of status.

a. The first case involves Section 1255a(a)(3), which provides that an alien generally is not eligible for adjustment under IRCA unless he has remained in this country continuously since November 6, 1986. Section 1255a(a)(3)(B) mitigates this requirement somewhat by providing that an alien shall not be considered to have failed to maintain continuous physical presence in the United States solely because of "brief, casual, and innocent absences from the United States." Shortly after IRCA was passed, INS interpreted this provision to exclude any absences that were not authorized by INS in advance. See 52 Fed. Reg. 16,208-16,209 (1987) (codified at 8 C.F.R. 245a.1(g)).

In November 1986, respondents Catholic Social Services, Inc. and other organizations and individuals commenced an action in the United States District Court for the Eastern District of California. The district court certified a class of aliens consisting of all persons who (a) would be eligible for legalization under Section 1255a except for having been absent from the United States without INS's advance permission, and (b) assert that the absence was brief, casual, and innocent. In May 1988, the district court granted summary judgment to respondents and enjoined INS from enforcing its administrative interpretation. *Catholic Social Services, Inc.* v. *Meese*, 685 F. Supp. 1149 (1988). Turning to remedial issues, the court issued

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(incorporating the provisions of 28 U.S.C. 2342-2350 by reference).

an opinion on June 10, 1988 requiring INS to ignore the statutory cutoff for acceptance of applications. INS was ordered—through November 30, 1988—to accept adjustment applications from class members who claimed that INS's interpretation of the "brief, casual, and innocent absences" provision had deterred them from filing applications in a timely manner. App. 22a-28a.[4]

In response to this Court's June 17, 1988 decision in *INS* v. *Pangilinan*, 486 U.S. 875, the government filed a motion to vacate that portion of the district court's decision extending the filing deadline established by Congress. After further briefing, the district court denied the motion. App. 40a-49a. Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," *id.* at 42a n.2, the court concluded that it had power to extend the statutorily imposed deadline. Although it "recognize[d] that there is dicta in [*Pangilinan*] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose." *Id.* at 42a.

b. The second case concerns Section 1255a(a)(2), which provides that an alien is not eligible for relief under IRCA unless he has resided continuously in this country in an unlawful status since before January 1, 1982. INS interpreted this section to mean that an

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[4] The court issued a supplemental order on August 11, 1988 (App. 29a-33a) requiring INS to advise individuals in its custody of any rights they might have under the district court's prior orders.

alien who left the United States and then reentered using a fraudulent but facially valid nonimmigrant visa or other documentation was not eligible for relief, because the use of facially valid documentation made the subsequent residence lawful for purposes of this section of IRCA. See 8 C.F.R. 245a.2(b)(8).[5]

In July 1987, respondents League of United Latin American Citizens and various individuals brought an action challenging the regulation in the United States District Court for the Central District of California. Although INS withdrew the challenged regulation in October 1987,[6] the suit continued, and the district court held in July 1988 that the original INS policy had been invalid. See App. 8a-9a. Finally, in August 1988 the court issued a remedial order requiring INS to continue until November 30, 1988 to accept applications for relief from aliens who claimed that they would have applied for relief in a timely manner but for INS's interpretation of the "continuous unlawful residence" provision. App. 50a-60a. Like the district court in the *CSS* case, the court rejected the government's reliance on *Pangilinan*. See App. 57a-58a.

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[5] On its face, 8 C.F.R. 245a.2(b)(8) states that an alien will remain eligible for relief as long as his reentry was "not documented on Service Form I-94, Arrival-Departure Record." This has the effect of barring relief for aliens who entered with facially valid documents, because their entry would have been documented on an I-94.

[6] INS altered the regulations by issuing 8 C.F.R. 245a.2(b)(9) and (10). Subparagraph (9) provides that an alien is eligible for relief even if his entry is noted on the I-94, but subparagraph (10) conditions this on the alien's securing a waiver of the provision in 8 U.S.C. 1182(a)(19) that requires exclusion of aliens who enter the United States by fraud. See App. 8a-9a.

3. Although the government determined not to challenge the two district court rulings rejecting INS's interpretations of IRCA, it nevertheless appealed both cases to the Ninth Circuit. The appeals challenged the district court's authority to entertain the cases and to grant relief extending the statutory cutoff for filing applications.[7] Pursuant to an expedited scheduling order, oral argument in the *CSS* case was heard in November 1988.[8] The court of appeals did not render a decision for more than three years, until February 13, 1992.[9]

a. The court first rejected the government's argument that 8 U.S.C. 1255a(f) precluded district court jurisdiction over the two cases.[10] App. 10a-15a. The

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[7] After issuing three temporary stays in the *CSS* case, see App. 94a, 95a, 96a, the court of appeals issued an order on September 20, 1988 (App. 97a-98a) partially granting the government's motion for a stay pending appeal. The order incorporated by reference the terms of a stay issued by the *CSS* district court on June 24, see App. 34a-39a. By prohibiting INS from deporting class members, the order effectively bars INS from deporting any individual who submits to INS an application contending that he is entitled to relief, although it does allow INS to defer adjudication of the applications.

[8] The court subsequently consolidated the *LULAC* case with the *CSS* case and accepted briefs in the *LULAC* case without ordering further arguments.

[9] By this time, INS had received nearly 300,000 applications under the district court order extending the statutory deadlines, as extended by the stay order issued by the court of appeals. See note 7, *supra*; Declaration of James A. Puleo (attached to government's stay application in the Ninth Circuit), App. 83a.

[10] As the court of appeals noted, the district court in the *LULAC* case did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. See App. 10a n.3. This Court's decision

court of appeals relied heavily on this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), which involved similar provisions of IRCA related to relief for agricultural workers. The court reasoned that *McNary* limited the effect of Section 1255a(f) to "denials of *individual* * * * applications," App. 12a. Because this case did not involve an individual application, but a class-wide challenge to the standards to be applied to individual applications, the court concluded that jurisdiction was available under *McNary*. *Id.* at 14a.

The court acknowledged that the District of Columbia Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), was in conflict with its determination. *Ayuda*, the Ninth Circuit noted, addressed the "same jurisdictional issue," but had read *McNary* to give Section 1255a(f) a much more preclusive effect—barring judicial review of any issues "that go to the heart of an applicant's claim," even if presented on a "class-wide" basis, as in this case. App. 15a (quoting *Ayuda*, 948 F.2d at 749). The court of appeals nevertheless "decline[d]" to "follow the D.C. Circuit's * * * decision." App. 14a.

b. With respect to the propriety of the judiciary's extending the application deadline, the court of appeals rejected the government's argument that this Court's decision in *Pangilinan* barred the district court from extending the application deadline. App. 15a-19a. In the Ninth Circuit's view, *Pangilinan* could be distinguished on several different grounds. *First*, that the remedy imposed here was not naturalization, but simply an order requiring INS to consider applications for adjustment of status, *id.* at 16a-17a; *second*, that, "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress," App. 17a [11]; and *third*, that *Pangilinan* had been influenced by subsequent legislative developments indicating that Congress would not have approved of an extension of the deadline. The court noted contrasting circumstances in this case, where the comments of one Senator debating a subsequent statute suggested that Congress would have approved of a judicial extension of the deadline. App. 18a-19a.

c. Recognizing that the long delay in deciding the cases had allowed the initial time period set forth in the district courts' injunctions to expire, the court of appeals remanded the cases to the district courts to provide for a further extension of the application period, equivalent to the periods originally ordered. App. 19a.[12]

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in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-388 (1978), though, establishes that the separate-judgment requirement can be waived. The court of appeals correctly concluded that the requirement in fact was waived in this case, because "both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal." App. 10a n.3. In any event, even if this requirement had not been waived, the court of appeals still would have had jurisdiction over the appeal in the *CSS* case, which adequately presents the questions raised by this petition.

[11] The court stated that the deadline at issue in *Pangilinan* had been part of the statute, and suggested that IRCA differed because "Congress did not provide a specific cutoff date for amnesty applications [in IRCA]." App. 18a.

[12] The government filed a motion (App. 61a-98a) for an order staying the government's obligation to continue accepting applications pending disposition of this petition, but the court of appeals instead stayed the mandate, leaving in place the existing stays, discussed in note 7, *supra*.

REASONS FOR GRANTING THE PETITION

The court of appeals has rendered an important decision that has a significant practical effect on INS's administration of the legalization program established by IRCA, in direct conflict with a recent decision of the Court of Appeals for the District of Columbia Circuit. In effect, the court of appeals has allowed respondents to secure relief in the district courts that requires INS to entertain applications for legal residency from over 300,000 aliens who failed to comply with the statutory deadline established by Congress. Under this order, INS has been required to continue accepting new applications for more than four years after the deadline.

This ruling directly contravenes the express provisions of IRCA in two respects. First, IRCA establishes a single avenue of administrative review, with judicial review limited to the courts of appeals. Second, IRCA bars the processing of any applications filed after the cutoff date. Not only does the decision run afoul of IRCA itself and create an enormous administrative burden on INS, the decision directly conflicts with a decision of the District of Columbia Circuit, represents an unwarranted expansion of this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and cannot be reconciled with the decision of this Court in *Pangilinan*. Review by this Court is therefore warranted.

1. a. The court of appeals' decision upsets the carefully delineated scheme for judicial review Congress set forth in IRCA. As summarized above, IRCA was designed to provide one certain path for litigation with respect to eligibility for adjustment of status. Allowing respondents to maintain these class actions in the district courts creates a second means

of judicial review that bypasses adjudication by the expert administrative agency and thus gives the individual members of the respondent classes a choice of forum clearly inconsistent with the statute.[13]

This Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), does not require this result. *McNary* held only that Section 1255a(f)(1)'s preclusion of review of "a determination respecting an application for adjustment of status" does not bar "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications," 111 S. Ct. at 896. As the Court pointed out, if Section 1255a(f) barred the collateral challenge at issue in *McNary*, the plaintiffs "would not as a practical matter be able to obtain meaningful judicial review" of their claims. 111 S. Ct. at 898. Thus, "the well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" weighed heavily in favor of allowing the case to proceed in district

[13] It is also apparent that the APA does not give respondents a cause of action to challenge the regulations even if Section 1255a(f)(1) does not itself bar review. Under 5 U.S.C. 704 of the APA, the only agency actions for which the APA grants a cause of action are those for which "there is no other adequate remedy in a court." Further, Section 702 of Title 5 limits APA review to individuals "adversely affected or aggrieved by agency action." As this Court explained in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990), "a regulation is not ordinarily considered the type of action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 3190. This rule suggests that the members of the respondent class to whom INS has not yet applied the challenged regulations have no basis for suit; the organizations representing their interests can have no greater rights.

court. *Ibid.* Moreover, judicial review would have been impractical because IRCA limits judicial review to the administrative record, which would contain no evidence with respect to the types of claims brought in *McNary*. See *id.* at 896-897. Finally, because the claim in *McNary* was a collateral challenge to INS's procedures, rather than to the substantive standards under which INS evaluated applications, a decision accepting the challenge would not "have the effect of establishing [the plaintiffs'] entitlement to [relief under IRCA]." *Id.* at 898.

None of those facts is present here. First, the ruling here does establish the class members' entitlement to relief, at least as to the only substantive issue identified with respect to respondents' circumstances.[14] Indeed, the district court's order in the *CSS* case makes this clear: INS was directed to reopen and grant applications that previously had been denied on the basis of the agency's interpretation of eligibility criteria. App. 24a (requiring INS to "readjudicate such applications in a manner consistent with the court's order [rejecting INS's interpretation of IRCA]").

Second, the challenges to the regulations in issue here—unlike the claims in *McNary*—are unquestionably subject to "meaningful judicial review" under the procedures established by IRCA. In both cases respondents' claims amount to nothing more than contentions that INS applies incorrect standards in determining whether aliens are entitled to relief under

[14] See App. 5a (*CSS* order covers "aliens who were prima facie eligible for legalization except for an unauthorized absence from the United States"), 9a (*LULAC* class includes aliens "who qualified for legalization but were deemed ineligible for it under the original reentry policy").

IRCA.[15] Yet, a challenge to the agency's interpretation of statutory prerequisites for relief is among the most common types of challenges brought in the course of an administrative proceeding contesting an agency decision denying relief. See, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (court of appeals decision overturning INS decision denying adjustment of status based on an improper construction of IRCA). A challenge brought in that context benefits from the concrete factual setting that aids judicial resolution of such questions.[16] Moreover, permitting applicants to bypass the administrative review process prevented the Attorney General's designated authority—which has the primary responsibility for resolving such questions—from considering these central statutory issues.

Finally, the administrative record related to an applicant's adjustment of status application would provide an adequate basis for judicial review of respondents' claims that INS has misinterpreted the criteria for eligibility. Indeed, as noted above, such an administrative record would afford a specific factual setting that would aid judicial review of the claim.

In short, respondents readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that would have been

[15] See App. 5a (*CSS* complaint sought "to bar the implementation of th[e challenged] regulation"), 8a (*LULAC* complaint "challeng[ed] the validity of the INS's fraudulent reentry regulation").

[16] See *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990) ("a regulation is not ordinarily considered the type of action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him").

brought against them if they had been denied relief. If INS's interpretation of the eligibility requirements was upheld and the aliens were denied adjustment of status, that ruling would have been subject to review in the court of appeals. See 8 U.S.C. 1105a(a) (incorporating by reference the procedures for appellate review described in 28 U.S.C. 2342-2350).[17]

Thus, the presumption in favor of judicial review that was central to the Court's concerns in *McNary* has no applicability in this case. Rather, the real question in this case is whether respondents are entitled to an additional means of review beyond the one fashioned by Congress. On that question, the general rule is that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see 5 U.S.C. 704 (Administra-

[17] It is worth noting that courts have concluded that the exclusivity of the review of deportation available under Section 1105a bars district court review not only of the final deportation order itself, but also of denials of relief that, like adjustment of status, would have the effect of barring deportation. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 220-232 (1963) (discretionary denials of relief in deportation proceedings); *Melendez* v. *Department of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (noting that court of appeals jurisdiction under Section 1105a is exclusive avenue for review of denials of asylum); *Kashani* v. *Nelson*, 793 F.2d 818, 822-828 (7th Cir.) (holding that district courts have no authority to entertain actions challenging denial of asylum), cert. denied, 479 U.S. 1006 (1986). In light of these cases, it would be all the more odd to conclude—in the face of the express preclusion of alternate forms of judicial review set forth in Section 1255a(f)(1)—that unsatisfied claimants for adjustment of status enjoy the capacity to select alternate fora.

tive Procedure Act provides for judicial review only in cases for which "there is no other adequate remedy in a court"). The court of appeals erred in reading *McNary* to contravene these well-settled principles.

b. The Ninth Circuit's decision squarely conflicts with that of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991). In *Ayuda*, the D.C. Circuit considered [18] the availability of district court actions to challenge an INS regulation interpreting another provision of IRCA. See *Ayuda*, 948 F.2d at 745-746 (explaining plaintiffs' contentions regarding the meaning of a provision limiting relief to aliens whose unlawful status was "known to the Government"). The court of appeals rejected Ayuda's argument that *McNary* required it to accept jurisdiction over any claim other than a claim challenging the denial of a single application, explaining that *McNary* "was instead drawing a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim [or] seek * * * a declaration of what they believe is the proper statutory interpretation." *Id.* at 749 (citation and internal quotation marks omitted).

Because respondents' claims plainly "seek * * * a declaration of what they believe is the proper statutory interpretation," application of the *Ayuda* analysis in this case would have led to dismissal of these cases for lack of jurisdiction. The Ninth Circuit rec-

[18] The D.C. Circuit issued an earlier opinion finding jurisdiction improper in 1989, before this Court's decision in *McNary*. *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325. This Court granted the plaintiffs' petition for certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *McNary*. 111 S. Ct. 1068 (1991). The opinion discussed in the text was issued in response to this Court's remand order.

ognized this, but did not attempt to distinguish *Ayuda*. Rather, in response to the government's suggestion that the court "follow the D.C. Circuit's recent decision in *Ayuda*," the Ninth Circuit expressly rejected the reasoning of *Ayuda* and stated: "We decline to do so." App. 14a.[19] As a result, the class of aliens who claimed that their IRCA applications were denied improperly on the grounds that they were not "known to the government" can challenge that determination only in a deportation proceeding, and cannot obtain a judicial extension of the statutory deadline. By contrast, the aliens in these cases, who claim that their applications were, or would have been, improperly denied on the basis of the regulations at issue in these cases, have the option of choosing a district court forum. This Court should grant certiorari to resolve the conflict.

2. The Ninth Circuit's decision extending the statutory deadline for applications established by IRCA also contravenes the plain language of IRCA and this Court's opinion in *INS* v. *Pangilinan*, 486 U.S. 875 (1988), which reversed a similar action of the Ninth Circuit. In *Pangilinan*, certain citizens of the Philippines claimed eligibility for naturalization under a special statutory program that had expired in 1946. See *id.* at 877-880. The applicants in *Pangilinan* argued that the tardiness of their applications should be excused in order to remedy circumstances that prevented a timely filing: for a certain period of time the United States had not stationed an officer in the Philippines with authority to receive applications.

[19] In her dissent from denial of rehearing en banc in *Ayuda*, Judge Wald, joined by Chief Judge Mikva and Judges Edwards and Ruth Ginsburg, noted the square conflict between *Ayuda* and the decision in these cases. 958 F.2d 1089 (1992) (noting that the Ninth Circuit "ha[s] interpreted *McNary* in just the opposite way" from *Ayuda*).

See *id.* at 879-880. The Ninth Circuit held that the withdrawal of authority to receive applications was unlawful and that naturalization of the applicants would be an appropriate equitable remedy. *Id.* at 882.

This Court reversed. Responding to the notion that the judicially fashioned relief represented an appropriate exercise of the federal courts' equitable powers, this Court explained that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-884. More fundamentally, such a remedy was inappropriate because it violated the strict terms of the statute authorizing naturalization. The Court firmly noted: "[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." *Id.* at 883 (citations and internal quotation marks omitted).

This case is on all fours with *Pangilinan*. Just as in *Pangilinan*, the Ninth Circuit's response to errors in the implementation of a statutory immigration program has been to issue an order requiring INS to ignore the express statutory deadlines that Congress enacted. The statute plainly provides that relief is available only to individuals who "apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General" and states flatly that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." Yet, in 1992,

more than *five years* after November 6, 1986, INS is still receiving applications pursuant to the Ninth Circuit's order.

The Ninth Circuit's attempts to distinguish *Pangilinan* are unavailing. First, it argued (App. 16a-17a) that *Pangilinan* was not controlling because "the remedy ordered by the district courts here is not naturalization." App. 16a. This argument blinks at reality. The district courts have ordered INS to consider a group of applications identified as having a single disqualifying defect and to excuse that defect. This means that INS must grant these applications, which in turn entitles the applicants to lawful residency status.[20] Under this reading, any court can evade the substantive import of *Pangilinan* simply by recrafting the terms of its order; the *Pangilinan* court, for example, could have ordered INS to consider the Philippine applications without regard to their lack of timeliness. There is nothing in this Court's legal analysis that would permit such circumvention of the statutory deadline.[21]

---

[20] Nor is it relevant that the relief offered by IRCA is lawful residency, rather than full naturalization. Congress's power to determine which aliens will be permitted lawful residence in this Nation is just as plenary as its power to determine which aliens will be permitted to become citizens.

[21] The Ninth Circuit suggested that this Court's decision in *McNary* supported the relief issued here, noting that the *McNary* Court stated that its ruling would allow aliens "to have their case files reopened and their applications reconsidered." App. 17a (quoting *McNary*, 111 S. Ct. at 898). The critical difference, of course, is that the order affirmed by this Court in *McNary* commanded INS to reconsider under proper procedures applications that had been filed in a timely manner. The Ninth Circuit's opinion orders INS to consider untimely applications in defiance of the express, statutory requirements for granting an application.

The Ninth Circuit also suggested that the relief issued here was appropriate because "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress." App. 17a. It should go without saying that the Ninth Circuit's concept of the public policy established by Congress cannot serve as a basis for judicially altering the precise time deadlines established by Congress. If Congress had intended to permit waivers and extensions, it would have said so. Instead, Congress said that there could be *no* judicial review of INS decisions rejecting untimely applications, 8 U.S.C. 1255a(f)(2)—hardly the terms Congress would use if it intended to permit court-imposed waivers of the cutoff.

The Ninth Circuit next attempted to distinguish *Pangilinan* by noting that the deadline violated by the Ninth Circuit in *Pangilinan* had appeared in the statute itself; by contrast, the court asserted, IRCA does "not provide a specific cutoff date for amnesty applications." App. 18a. This assertion is incorrect. Section 1255a(a)(1)(A) required the application period to end on the last day of a twelve-month period beginning "not later than 180 days after November 6, 1986." Although the Attorney General could have acted to secure an earlier termination date of the program, he had no authority whatsoever to extend the program beyond the date he set. See note 1, *supra*. The extension ordered by the court of appeals cannot be reconciled with the plain language of Section 1255a.

Finally, the court of appeals contended that *Pangilinan* did not apply here because of post-enactment legislative history suggesting that Congress believed that the courts had the power to extend the deadline. App. 18a-19a. This analysis is doubly flawed. Reli-

ance on such materials to justify alteration of the precise deadline contained in IRCA flatly ignores this Court's statement that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); see *id.* at 118 n.13. What is more, the views of individual Members of Congress (even if contemporaneous with the consideration and passage of the measure) scarcely rise to the level of the Congress itself, which is structurally restrained in the creation of law by the features of Bicameralism, majority-vote requirements, and the Presentment Clause.[22] See *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983).

3. The issues presented are of substantial importance and plenary review by this Court is needed. As we have indicated, the Ninth Circuit's decision squarely conflicts with the D.C. Circuit's holding in *Ayuda* and this Court's analysis in *Pangilinan*. Moreover, the Ninth Circuit's ruling has a dramatic impact on a significant statutory program. The district courts' orders extending the deadlines already have required INS to accept 300,000 applications that otherwise would have been untimely under the terms

[22] In any event, it is doubtful that the legislative history establishes that Congress thought the deadline could be extended. The court cited the statement of *one* Senator showing his belief that courts could extend the deadline. App. 19a. Other members of the Senate voiced their belief that the statutory deadline was final. See, *e.g.*, 134 Cong. Rec. 9296-9297 (1988) (remarks of Sen. Simpson); *id.* at 9292-9293 (remarks of Sen. Gramm). Accordingly, it is seriously misleading to attribute to the entire Congress a belief suggested only by the isolated remark of a single legislator discussing a subsequent bill that never became law.

of Section 1255a(a). See App. 82a-83a.[23] Even though INS has not yet adjudicated the merits of these applications, receiving and administering them for five years beyond the statutory cutoff has substantially increased the costs of this program. Further, if the ruling stands, INS will be compelled to examine on an individual basis more than 300,000 applications to consider whether their failure to seek relief in a timely manner was caused by INS's invalid regulations. This is precisely the type of diversion of administrative resources that the filing deadline and the related preclusion of judicial review were designed to avoid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1992

[23] The 300,000 applications filed under the order in this case work a substantial expansion of the program ordered by Congress, which resulted in 1.9 million applications filed in a timely manner. See App. 85a.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127
88-15128

D.C. No. CV-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., (Centro De Guadalupe Immigration Center); CALIFORNIA COALITION OF WELFARE CENTER FOR IMMIGRANTS RIGHTS, INC.; MERCEDES AGUILAR DE LOPEZ; MARIA TERESA REYES; and SARA ORANTES DE PALACIOS, PLAINTIFFS-APPELLANTS AND CROSS-APPELLEES

v.

RICHARD THORNBURGH, Attorney General of the United States of America, DEFENDANT-APPELLEE AND CROSS-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

No. 88-6447

D.C. No. CV-87-4757-WDK

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Central District of California
William D. Kelier, District Judge, Presiding

Submitted February 5, 1992 *
Filed February 13, 1992

Before: Alfred T. Goodwin, Joseph T. Sneed and Procter Hug, Jr., Circuit Judges.

Opinion by Judge Hug

OPINION

HUG, Circuit Judge:

The Immigration and Naturalization Service ("INS") appeals several district court orders resulting from successful class action challenges by aliens

---

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

and immigration rights groups to the INS's implementation of the Immigration Reform and Control Act of 1986 ("IRCA or "the Act"). In separate district court actions, Catholic Social Services, Inc. ("CSS") and the League of United Latin American Citizens ("LULAC") obtained declaratory and injunctive relief against the INS for its administration of IRCA's legalization program for aliens living illegally in this country. For certain aliens, the injunctions extended the period for filing legalization applications beyond the deadline set by the Attorney General. The United States contends that the district courts lacked jurisdiction under IRCA to hear the suits and that the courts exceeded their authority in extending the application period. CSS cross appeals, contending that the trial court erred in refusing to order the Government to allow all deported class members to reenter the United States to reap the benefits of the deadline extension. We conclude that district courts had jurisdiction and affirm the judgments.

I. *BACKGROUND*

In response to growing concerns over the influx of illegal aliens into the United States, Congress passed IRCA in 1986 as an amendment to the Immigration and Naturalization Act of 1952. IRCA consists of two main parts. One part, not at issue here, imposes sanctions for the employment of undocumented aliens in American businesses. 8 U.S.C. § 1324a (1988). The other part established two provisions under which undocumented aliens could obtain legal resident status. The first provision, also not at issue here, was directed at special agricultural workers ("SAW"). 8 U.S.C. § 1160 (1988). The second provision set up a one-time only legalization program through which aliens could apply for lawful tempo-

rary resident status and thus, after a one-year waiting period, could apply for permanent residency. 8 U.S.C. § 1255a (1988). The program required the alien to have resided continuously and unlawfully in the United States since January 1, 1982, 8 U.S.C. § 1255a(a)(2)(A), and to have been continuously physically present in the United States since November 6, 1986, the date of IRCA's enactment, 8 U.S.C. § 1255a(a)(3)(A). Aliens residing outside the United States could not be admitted to the United States in order to apply for legalization. 8 U.S.C. § 1255a(a)(3)(C). The Act provided that the aliens would have a twelve month period in which to file applications. The Act authorized the Attorney General to set the dates of the application period. 8 U.S.C. § 1255a(a)(1)(A). The Attorney General set the period to run from May 5, 1987, to May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988).

A. *The CSS Appeals*

CSS initiated its action in the district court in November 1986 in response to the INS's administration of IRCA's provision concerning casual and innocent absences from the United States. Under IRCA, an alien could enjoy "brief, casual, and innocent absences" from the country without violating the continuous physical presence requirement. 8 U.S.C. § 1255a(a)(3)(B) (1988). In November 1986, in a nationwide telegram to its offices, the INS promulgated an interpretation of section 1255a(a)(3)(B) that required that aliens obtain INS approval, or "advance parole," before taking casual absences. The INS immediately enforced this interpretation and began to apprehend and deport aliens who left the United States after November 6, 1986, without receiving advance parole. CSS went to court to bar the implementation of this regulation.

On November 24, 1986, the district court provisionally certified the case as a class action and issued a temporary restraining order to prevent the INS from deporting aliens who were prima facie eligible for legalization except for an unauthorized absence from the United States. The Government appealed that order to a motions panel of this court and sought a stay. That panel characterized the order as a preliminary injunction and issued a stay pending review. In April 1987, a merits panel of this court declined to address the dispute over the advance parole condition on the grounds that the district court had not had an opportunity to decide the issue or to resolve some factual questions. The panel limited its holding to the conclusion that the trial court had abused its discretion by finding that CSS was likely to succeed on the merits of the absence argument. It reversed the temporary restraining order and remanded the case for further consideration. Within a month of that decision, however, the INS announced that it would apply the advance parole provision only to aliens who departed or wished to depart the country after May 1, 1987. *See* 8 C.F.R. § 245a.1(g) (1991). In light of this change, the panel withdrew its opinion, which focused on the policy of requiring advance parole as of November 1986, but vacated the temporary restraining order and remanded the case without prejudice for further proceedings. *Catholic Social Services, Inc. v. Meese*, 820 F.2d 289 (9th Cir. 1987).

Upon remand, the district court issued an order in May 1988, invalidating the INS's interpretation of section 1255a(a)(3)(B) and enjoining the INS from enforcing it. *See Catholic Social Services, Inc.*

v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988). On May 3, 1988, the court certified a class of plaintiffs consisting of "all persons prima facie eligible for legalization under INA § 245A [8 U.S.C. § 1255a] who departed and reentered the United States without INS authorization (i.e., "advance parole") after the enactment of IRCA following what they assert to have been a brief, casual and innocent absence from the United States." The Government does not challenge the court's invalidation of the INS's casual absence interpretation or the constitution of the certified class.

Both parties, however, find fault with the remedies ordered by the district court. The court issued its first of three remedial orders in June 1988. In that order the district judge instructed the INS to extend the filing deadline from May 4, 1988 to November 30, 1988, for class members who were deterred from seeking legalization by the INS's casual absences regulation.[1] The court, citing 8 U.S.C. § 1255a(3)(C), refused to order readmission into the country of the subclass members who had been deported or allowed to voluntarily depart. CSS appeals this refusal to readmit class members living outside the United States.

Within days after the filing of the June order, the Supreme Court issued its decision in *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988). The Government immediately moved the district court to dissolve the extension of the application deadline on the grounds that it violated *Pangilinan*. When the court had not acted on the motion by

[1] The court chose November 30, 1988, to coincide with the cut-off date under 8 U.S.C. § 1160(a)(1)(A) (1988) for legalization applications from special agricultural workers.

August 8, 1988, the Government withdrew the motion and filed the first of its two appeals.

On August 11, 1988, the trial court entered the second and third of its remedial orders, which took the form of supplements to the June injunction. In the first August order, the court concluded that *Pangilinan* did not invalidate the deadline extension. Acknowledging that its decision might be reversed, however, the court provided for an alternative remedy, which would have prohibited the INS from deporting or removing from the country any class member on grounds related to the CSS litigation and would have obligated the INS to provide class members with permanent work authorization documents. Since we find the extension appropriate, we need not consider the alternative remedy. In the second August order, the court mandated a set of procedures for the INS to use in determining whether an apprehended alien fell under the scope of the June injunction. The Government's second appeal in this case challenges the August orders.

After receiving the three appeals discussed above, we granted first a temporary stay of the original injunction and its supplements, and then a stay for the pendency of the a[illegible]. We also directed the INS to release detained c[illegible] members and grant them temporary work permits until we resolved this case.

Shortly before oral argument, we ordered the parties to brief the impact of IRCA's judicial review provisions, 8 U.S.C. §§ 1255a(f)(1)-(4) on the case. We withdrew submission pending Supreme Court decisions in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991) and *Ayuda, Inc. v. Thornburgh*, 111 S. Ct. 1068 (1991). We now resubmit the case. The Government contends that those provisions barred

district court jurisdiction over the suits. CSS and LULAC argue that the review provisions have no impact on the trial court's subject matter jurisdiction.

B. *The LULAC Appeal*

The events leading up to LULAC's appeal are considerably less involved than in CSS.[2] LULAC filed its suit in July 1987, challenging the validity of the INS's fraudulent reentry regulation. As noted above, IRCA required an alien seeking legalization to show that he or she had resided continuously and unlawfully in the United States since January 1, 1982. *See* 8 § U.S.C. 1255a(a)(2)(A) (1988). In August 1987, the INS issued 8 C.F.R. § 245a.2(b)(8) (1991), which had the effect of declaring statutorily ineligible for legalization any alien who left the United States and reentered using any sort of fraudulent visa or fraudulent INS documentation. The INS apparently reasoned that reentry by use of a fraudulent but facially valid immigration document was constructively lawful and therefore interrupted the continuous unlawful residency requirement. Several aliens and LULAC sued to invalidate this regulation as contrary to IRCA and the Equal Protection Clause.

In October 1987, before the district court heard the action, the INS changed the fraudulent reentry policy. Under the new policy, announced at 8 C.F.R. §§ 245a.2(b)(9) and (10) (1991), an alien entering under a fraudulent document would be eligible for legalization but had to apply for a waiver excusing

[2] We note that the parties in LULAC stipulated to the dismissal of the organizational plaintiffs. For the sake of convenience, we will continue to refer to the case as "LULAC."

the fraud. The LULAC plaintiffs responded to the change by amending their complaint to seek a declaratory judgment that the original regulation had been invalid.

In July 1988, the district court granted the plaintiffs' motion for class certification and rendered its decision. The court found that the first fraudulent reentry regulation conflicted with IRCA but that the waiver revision was valid. After directing the parties to submit additional briefing on the issue of an appropriate remedy and specifically instructing them to consider the effect of *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988), the court ordered a remedy similar to the injunction awarded to CSS. It directed the INS to extend the application deadline from May 4 to November 30, 1988 for aliens in the certified class who qualified for legalization but were deemed ineligible for it under the original reentry policy. In reaching its decision, the court found that it had subject matter jurisdiction and that *Pangilinan* did not bar the extension.

The Government appeals the August order. It challenges both the jurisdiction ruling and the deadline extension. The parties agreed to a stay of the injunction during the pendency of this review.

We consolidated the appeals in CSS and LULAC because they present substantially the same legal issues. We are called upon to decide whether the district courts in these cases had jurisdiction to hear the suits and whether the injunctive remedies they issued can stand. We also address the issue of whether the district court in CSS properly denied reentry to aliens residing outside the country. Our jurisdiction to review the CSS injunction is provided by 28 U.S.C. § 1292(a)(1) (1988). We review the

LULAC order under 28 U.S.C. § 1291 (1988).[3] We consider each issue in turn.

II. *JURISDICTION*

The threshold issue in this case is whether the district courts had jurisdiction to hear the suits filed by CSS and LULAC. CSS and LULAC contend that the district courts had federal question jurisdiction under 28 U.S.C. § 1331. The Government argues that IRCA provisions preclude jurisdiction in this case.

IRCA's provisions for judicial review of legalization determinations are found in 8 U.S.C. § 1255a(f). Administrative and judicial review of a legalization determination can occur only as prescribed by section 1255a(f). 8 U.S.C. § 1255a(f)(1). Section 1255a(f)(2) provides: "No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." An application denied for other reasons may be reviewed by an administrative appellate

[3] The injunction in CSS does not resolve all the issue in the case, *Catholic Social Services*, 685 F. Supp. at 1151, and therefore reaches us as an interlocutory appeal. The LULAC injunction does dispose of all the issues raised before the trial court. We note, however, that the court in LULAC did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. Since both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal, we deem the separate-judgment requirement waived and assume jurisdiction under section 1291. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386-88 (1978).

authority, 8 U.S.C. §1255a(f)(3)(A), and then by a court of appeals, 8 U.S.C. § 1255a(f)(4)(A).[4]

The Supreme Court's holding in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), is instructive. In *McNary* the Supreme Court considered the IRCA review provisions for special agricultural workers ("SAW"). Those SAW review provisions, as set forth in 8 U.S.C. § 1160(e),[5] are substantially the

[4] Under 8 U.S.C. § 1255a(f)(4)(A), judicial review is governed by 8 U.S.C. § 1105a. Section 1105a states that review (of a denial) is available in federal courts only after the alien has exhausted all administrative remedies. 8 U.S.C. § 1105a(c). Administrative appellate review of legalization determinations is based solely upon the administrative record and upon additional or newly discovered evidence that was not available at the time of the determination. 8 U.S.C. § 1255a(f)(3)(B). Judicial review is based solely upon the administrative record established at the time of the administrative appellate review unless the applicant establishes that there was an abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record as a whole. 8 U.S.C. § 1255a(f)(4)(B).

[5] Section 1160(e) provides:

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application

same as the review provisions at issue in the instant case except that the SAW review provisions do not have a timely application provision. In *McNary*, the action alleged a pattern or practice of due process violations by the INS in its administration of the SAW program. 111 S. Ct. at 893-94. The Government argued that the judicial review provisions precluded the district court from exercising general federal question jurisdiction over the action. *Id.* at 896. The Court held that review was permissible because the review provisions applied "only to review of denials of *individual* SAW applications." *Id.* at 897 (emphasis added).

The *McNary* Court's decision was based on "the absence of clear congressional language mandating preclusion of federal jurisdiction." *Id.* at 892. The Court explained:

> The critical words in § 210(e)(1), however, describe the provision as referring only to review "of *a determination* respecting *an application*"

> and upon such additional or newly discovered evidence as may not have been available at the time of the determination.
>
> (3) Judicial review
>
> (A) Limitation to review of exclusion or deportation
>
> There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.
>
> (B) Standard for judicial review
>
> Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

> for SAW status (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when § 210(e)(3), see 8 U.S.C. § 1160(e)(3), further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application.

Id. at 896.

The Court continued:

> This reading of the Reform Act's review provision is supported by the language in § 210(e)(3)(B) of the INA, which provides that judicial review "shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). . . . Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in § 210(e) is not contemplated by the language of that provision.

Id. at 896-97.

The Court recognized "that had Congress intended the limited review provisions of § 210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.* at 897.

All of the court's considerations in *McNary* apply with equal force in the instant case. The references in § 1255a(f) to "a determination respecting an application," 8 U.S.C. § 1255a(f)(1), and to a "denial of adjustment of status," 8 U.S.C. § 1255a(f)(2), are relevant to an individual legalization determination, but not to a case such as this one where the INS's regulations are being challenged. Moreover, the administrative record and appeals process would be of no help in addressing the constitutional and statutory claims brought in this case. If Congress wanted the IRCA review provisions to apply to challenges of INS regulations implementing IRCA, it could have used broader statutory language.

The Government urges us to follow the D.C. Circuit's recent decision in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991). We decline to do so. The D.C. Circuit addressed the same jurisdictional issues presented in this case. The Supreme Court had vacated the D.C. Circuit's original decision in *Ayuda* and remanded the case for reconsideration in light of *McNary*. *See Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), *vacated and remanded*, 111 S. Ct. 1068 (1991). On remand, the D.C. Circuit held that the district court's jurisdiction was barred by 8 U.S.C. § 1255a(f)(1) and 8 U.S.C. § 1255a(f)(2). 948 F.2d at 759. In a well-reasoned opinion, Judge Wald dissented. *Ayuda*, 948 F.2d at 760 (Wald, J., dissenting).

In reaching its decision, the *Ayuda* majority concluded that *McNary* does not draw a distinction between individual and class-wide claims, but instead draws "a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim." *Id.* at 749. We find no basis for such an interpretation of *McNary*. The Supreme Court in *McNary* did not draw a distinction between collateral issues and issues that go to the heart of the claim.

The Court did, however, hold that IRCA's SAW review provisions apply "only to review of denials of *individual* SAW applications."[6] *McNary*, 111 S. Ct. at 897 (emphasis added). As discussed above, the review provisions in section 1255a(f) refer only to determinations of individual applications. We therefore hold that section 1255a(f) does not apply to this case.

III. *EXTENDING THE TIME PERIOD FOR AMNESTY APPLICATIONS*

The Government contends that the court's equitable powers do not include the power to extend the time period for applying for amnesty. In support of its

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[6] The D.C. Circuit's majority opinion is partly based on the fact that *McNary* was not concerned with 8 U.S.C. § 1255a(f)(2). Section 1255a(f)(2) is not relevant to the instant case. Section 1255a(f)(2) states, "No *denial of adjustment* of status under this section based on a late filing of an *application* for such adjustment may be reviewed by a court of the United States or of any State or reviewed in an administrative proceeding of the United States Government." 8 U.S.C. § 1255a(f)(2) (emphasis added). Like the other IRCA provisions, the language of section 1255a(f)(2) contemplates an *individual* determination of an alien's application. In the instant case an individual denial of application is not at issue. Section 1255a(f)(2) is therefore inapposite.

argument, the Government relies on *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988). In *Pangilinan*, sixteen Filipino nationals who served with the United States Armed Forces during World War II sought United States citizenship pursuant to sections 701 to 705 of the Nationality Act of 1940, Ch. 876, 54 Stat. 1137, as amended in 1942 by the Second War Powers Act, Ch. 199, 56 Stat. 182, *codified at* 8 U.S.C. §§ 1001-1005 (repealed 1952). The amended Act provided lenient rules for naturalizing aliens who served in the United States Armed Forces during World War II. Section 702 authorized representatives to receive petitions, conduct hearings and grant naturalization outside of the United States. In August 1945, a representative was designated to naturalize aliens in Manila. *Pangilinan*, 486 U.S. at 879. In October 1945, the Manila representative's authority was revoked. *Id.* at 879-80. Although naturalization officers were continuously available outside of the Philippines, a new representative was not appointed to Manila until August 1946. The new representative naturalized approximately 4,000 Filipinos before the Act's expiration on December 31, 1946. *Id.* at 880. Over thirty years later, the plaintiff Filipinos sought naturalization under the expired 1940 Act even though they had not applied for naturalization before the Act's expiration date. *Id.* The Supreme Court held that naturalization of the Filipino plaintiffs would not be an appropriate equitable remedy. *Id.* at 885.

The Government's reliance on *Pangilinan* in the present case is misplaced for several reasons. First, unlike that in *Pangilinan*, the remedy ordered by the district courts here is not naturalization. The Supreme Court's decision in *Pangilinan* was primarily

based on its conclusion that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." *Id.* at 883-84. The district court's orders here do not purport to grant citizenship to anyone. They simply order the INS to consider applications. As the Supreme Court recognized in *McNary*:

> [T]he individual respondents in this action do not seek a substantive declaration that they are entitled to SAW status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to SAW status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures.

McNary, 111 S. Ct. at 898. *See also Ayuda*, 948 F.2d 766 (Wald, J., dissenting) ("These petitioners are not seeking an ultimate determination of their eligibility for legalization, only a ruling that they could not be turned away at the door. . . .").

Second, in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress. In *Pangilinan*, the expiration date was part of section 702. 486 U.S. at 882. Congress clearly intended that applications not be accepted after the December 31, 1946, expiration date. Therefore, extending the deadline in *Pangilinan* would have frustrated congressional intent. *Id.* at 883. Congressional intent was followed because the plaintiffs had "ample opportu-

nities," *id.* at 885, to apply for naturalization before the expiration date.

In IRCA, Congress did not provide a specific cutoff date for amnesty applications. The Act establishes a twelve-month period for aliens to apply for amnesty. 8 U.S.C. § 1255a(a)(1)(A). It does not contain a specific deadline. Moreover, the Judiciary Committee intended "that the legalization program should be implemented in a liberal and generous fashion." H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess. 72 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5649, 5676. Thus, Congress clearly intended for illegal aliens to have ample and meaningful opportunities to apply for adjustments of status. The members of the plaintiff class did not have such opportunities because the INS's interpretation of the "brief, casual and innocent" provision was not invalidated until the Attorney General's deadline had almost expired.

Furthermore, in *Pangilinan*, the Court found that Congress clearly chose not to extend the deadline for Filipinos who had not been naturalized before the 1940 Act's expiration date. When Congress enacted a new citizenship program in 1948, it excluded Filipino servicemen and specifically provided that applications that were still pending would be adjudged under the new provisions. Act of June 1, 1948, ch. 360, 62 Stat. 281. *See Pangilinan*, 486 U.S. at 884.

In contrast to *Pangilinan*, Congress's decision not to extend the amnesty deadline set by the Attorney General was not intended to prevent the class members from applying for adjustments of status after the Attorney General's deadline. Congress was aware of the plight of persons like those in the plaintiff class when it voted to deny the extension. The members of Congress chose not to grant a general extension because they believed that the courts could provide an

equitable remedy. Senator Grassley, an outspoken opponent of the extension, argued:

> [T]he proponents argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legislation program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations. The Senate need not enact a broad extension to accommodate certain litigants.

134 Cong. Rec. S5037-01.

The INS misinterpreted IRCA and the plaintiffs acted quickly to remedy the misinterpretation. Congress intended for aliens to have a twelve-month period in which to apply for legalization and specified that the legalization program be implemented in a liberal and generous fashion. The INS's erroneous interpretation of the Act in reality deprived the aliens of the full twelve-month application period Congress had provided for them. It would be contrary to congressional intent to foreclose these aliens' applications. The equitable remedy provided by the two district courts is appropriate. Because the initial time period provided in the injunctions has expired, the actions are remanded to the district courts to revise the injunctions to provide an equivalent extension of the application period.

IV. *THE CROSS-APPEAL*

The district court denied an injunction ordering the Government to permit class members outside the United States to enter the United States in order to file applications for adjustment of status. Catholic

Social Services appeals that decision. We affirm the denial.

The Government bases its opposition to the injunction on 8 U.S.C. § 1255a(a)(3)(C). That section of IRCA states: "Nothing in this Section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection." Thus, although the statute does not authorize admission to the United States, it does not prohibit admission either. Therefore, section 1255a(a)(3)(C) does not provide a basis for our decision.

We do not know whether all of the class members are eligible for admission to the United States. Congress has established eligibility requirements for admission into the United States. *See* 8 U.S.C. § 1182. If we were to allow all of the class members to enter the United States, the admission of some of the aliens might violate the admission requirements. We have no way of knowing whether each of these class members is eligible for admission under these requirements. We therefore do not decide whether any class member is eligible for admission.

Moreover, some of the class members have been deported. If we were to order admission of these aliens, we would, in effect, be reviewing and reversing their deportation orders. As a general rule, we may not review deportation orders of aliens who have departed the United States after the order has been issued, although there are some exceptions. *See, e.g., Wiedersperg v. Immigration and Naturalization Serv.*, 896 F.2d 1179 (9th Cir. 1990) (alien could reopen ~~deportation~~ proceedings after the conviction that was the basis for his deportation was vacated, since the departure therefore was not legally executed). We do not know whether any class member is eligible to challenge his or her deportation order under an exception to this general rule, and we express no opinion in this regard.

THE JUDGMENTS ARE: AFFIRMED AND REMANDED FOR ADJUSTMENTS OF TIME PERIODS SPECIFIED IN THE INJUNCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

[Filed June 10, 1988]

The court has ordered further briefing on the question of what remedies are available to members of Subclass 1 and whether a stay of this court's orders should be granted.

It is apparent to the court that this court's equitable powers are sufficient to require the defendant to comply with the order appended hereto. The Congress intended that members of the subclass have one year to file, *see* 8 U.S.C. § 1255a(a)(1)(A); because of defendant's conduct, they were deprived of that right. Because defendant must accept SAW applications through November 30, 1988, the burden on the government in accepting and processing applications from Subclass 1 members is reduced.

Relative to Subclass 1 members who are no longer in the United States by virtue of deportation or so-called voluntary departures, plaintiffs propose as proper relief essentially that they be readmitted. This court concludes that such relief is inappropriate. The statute provides "[n]othing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection." 8 U.S.C. § 1255a(a)(3)(C). This section expresses a clear congressional policy; it appears inappropriate in framing relief for the government's failure to comply with one expression of congressional intent, to order conduct violative of another clear expression of congressional policy. Moreover, in significant part, the present plight of those outside the country exists because a motion panel of the Ninth Circuit precipitously, and apparently without full consideration of the consequences, first stayed and then vacated this court's temporary restraining order which, if it had been in effect, might have limited the number of persons in the subject category. The motion panel's conduct must be seen as in some sense an intervening cause of the absence from the country of those persons who are the subject of this paragraph. Given that fact, and in light of the clear congressional policy prohibiting admission for the purpose of applying for legalization, the remedy sought is inappropriate. With great reluctance, this court concludes that readmission for the purpose of righting the government's wrong contradicts congressional policy and I must decline to order it.

The question of the stay is equally problematic. I cannot but admit that the legal issues involved in this case may well be overshadowed by perceptions of

the social consequences of IRCA and of this court's opinion in the matter at bar. Under such circumstances, the result on appeal is uncertain. On the other hand, the Ninth Circuit's vacation of this court's previous temporary restraining order demonstrates the enormous consequence, including unforeseen consequences, of not having an injunction in place. In all, although at oral argument the court indicated a willingness to stay its injunction so as to permit orderly disposition, that course now seems inappropriate. Members of the subclass continue to be deported and rendered subject to voluntary departure. Moreover, plaintiffs' very labored proposed stay order demonstrates how very complex an order would be required, the effect of which, given the complexity, would be uncertain. Accordingly, the request for a stay will be DENIED.

For all of the above reasons heretofore expressed, IT IS HEREBY ORDERED that:

1. Defendant shall process all applications filed by plaintiffs and Subclass 1 members on or before May 4, 1988, in a manner consistent with this court's order of May 3, 1988.

2. Defendant shall identify through his records all Subclass 1 members whose applications for legalization under the Immigration and Nationality Act ("INA") § 245A were denied or recommended for denial because of application of 8 C.F.R. § 245a.1(g), and shall rescind such denials or recommended denials, including those applications that have been, are, or will be appealed pursuant to 8 C.F.R. § 245a.2(p), and readjudicate such applications in a manner consistent with the court's order of May 3, 1988. Defendant shall provide notice to such Subclass 1

members that their applications have been reopened pursuant to this court's order and if such class members have a prima facie claim to legalization, they shall be provided a stay of deportation and temporary employment authorization pending final adjudication of their applications.

3. Defendant shall accept for filing at INS Legalization offices legalization applications proferred by Subclass 1 members on or before November 30, 1988, or, if defendants seek and are granted a stay of this order, and if this court's order is thereafter affirmed by the Ninth Circuit, for a period of 180 days after such affirmance.

4. Within 15 days of the effective date of this order, the INS shall file and serve proposed procedures and guidelines setting forth the evidentiary requirements and standards of proof to be imposed on Subclass 1 members in order to demonstrate (a) that they knew of the defendant's unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application, and (b) that their absence from the country was "brief, casual and innocent." Plaintiffs shall have 10 days thereafter to respond to the procedures and guidelines proposed by INS.

In the interim, the INS will, and as an alternative to filing proposed guidelines and procedures, may thereafter accept applications accompanied by the applicant's sworn declaration stating (1) that the applicant was absent from the United States for a brief period on or after May 1, 1987, and returned other than pursuant to INS advance parole, (2) how the applicant was aware of the INS regulation, 8 C.F.R. § 245a.1(g), or the agency policy pursuant thereto and therefore reached the conclusion of ineligibility

for legalization, and (3) based upon such belief of ineligibility, did not file an application on or before May 4, 1988. In addition, before reaching a final decision on such applications, the INS may, in its discretion, require the applicant to produce corroborative evidence of the post-May 1, 1987 absence, including one of the following: (a) a sworn declaration from a third party with personal knowledge of the applicant's absence, or (b) a bus ticket or other form of transportation receipt evidencing the absence, or (c) any other evidence from which, when combined with the applicant's declaration, a reasonable inference can be drawn that the applicant in fact was absent from the country. If the defendant decides to follow this alternative on a permanent basis, he shall file a declaration so stating within 15 days of the effective date of this order.

If the applicant is prima facie eligible for legalization, the INS shall provide such applicant with a stay of deportation and temporary employment authorization pending final adjudication of the application.

This section shall apply to all Subclass 1 members in the United States, including those who failed to file an application within 30 days of receipt of an Order to Show Cause, and including those who applied for and were denied advance parole under 8 C.F.R. § 245a.1(g).

5. All applications filed pursuant to this order shall be finally adjudicated in accordance with the procedures and guidelines established pursuant to paragraph 4 of this order and in accordance with INA § 245A.

6. The confidentiality requirements of the legalization provisions of IRCA shall apply to all documents and evidence submitted by class members to establish

their entitlement to relief under this Order. Such documents shall not be made public or used for any purpose unrelated to this litigation by plaintiffs' counsel.

7. Appeals from denials of legalization applications filed pursuant to this order, including denials based upon a determination by INS that an applicant failed to demonstrate reliance on the unlawful regulation as the basis for failure to file a legalization application by May 4, 1988, shall be taken in accordance with the provisions of IRCA and the regulations promulgated thereunder for administrative and judicial review of denials of legalization applications.

8. Within 15 days of the effective date of this order, the government shall file and serve a proposed plan for publicizing the provisions of this order and the requirements for applications filed pursuant to this order, including, *inter alia*, making the names and addresses of plaintiffs' counsel available to subclass member applicants. Plaintiffs shall have 10 days thereafter to respond to the proposed plan.

9. The terms of this order appiy only to members of Subclass 1, as certified in this court's order of May 3, 1988.

10. The term "prima facie eligible for legalization" as used throughout this order is defined in 8 C.F.R. § 245a.1(n) and shall be implemented in a manner consistent with this court's order of May 3, 1988, regarding "brief, casual and innocent" absences.

11. Defendant shall advise all INS offices of the contents of this order and the court's May 3, 1988 order and class certification determination order.

12. This court shall retain jurisdiction to assure that this order is carried out fully and completely

and to provide such other and further relief as may be necessary to implement this order. If, in implementing this order, it appears necessary to either defendant or plaintiffs to modify the order, the parties shall first confer and attempt to reach agreement on such modification, and shall thereafter file a joint statement with the court setting forth the nature of the modification sought and the parties' respective positions on the proposed modification.

IT IS SO ORDERED.

DATED: June 10, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

ORDER

[Filed Aug. 11, 1988]

Upon consideration of plaintiffs' request for supplemental relief, and the supporting and opposing documents and arguments submitted by the parties,

IT IS HEREBY ORDERED that this court's order of June 10, 1988 is supplemented as follows:

1. Defendant shall determine whether apprehended and detained persons (other than persons apprehended while entering or attempting to enter the United States who sign voluntary departure agreements), and persons in deportation proceedings, are subclass 1 members, and the INS shall not remove under voluntary departure or deportation orders, or otherwise, any subclass 1 members until they have had a reasonable opportunity, of not less than thirty (30) days, to submit an application as provided in

paragraph 3 of the order of June 10, 1988. In addition to any other method of inquiry, such aliens shall be questioned regarding their membership in subclass 1, using the form attached hereto as Appendix A.

2. All such apprehended and detained persons, and persons in deportation proceedings, who, upon inquiry as specified in the foregoing paragraph, reveal facts which indicate that they are, or may be, subclass 1 members, or whose INS files indicate that they are members of subclass 1, shall be provided a written notice of this court's orders regarding subclass 1, and the names, addresses and phone numbers of plaintiffs' counsel (attached hereto as Appendix B).

3. If defendant believes that forms different than those attached hereto as Appendices A and B should be used, counsel are to confer and prepare an agreed-upon set of forms within ten (10) days from the effective date of this order, and then submit it to the court for approval.

4. If detained aliens, after being provided such notice, indicate that they nevertheless wish to depart the United States, they shall acknowledge, in paragraph 6 of Appendix B, receipt of the Notices (Appendices A and B), and indicate their desire to nevertheless depart the country. The address to which they intend to return abroad shall be noted on the document in which they acknowledge receipt of the aforementioned notice, and copies of such acknowledgements shall be provided to plaintiffs' counsel upon request.

5. When giving any of the notices referred to in this order, the alien shall be asked if he can read the language in which the notice is written, and if such person indicates the inability to so read, the

notice shall be read verbatim in the language that the person speaks.

6. If defendant's agents believe that an alien who claims to be a subclass 1 member is not a member of the class and is therefore subject to expulsion pursuant to voluntary departure, a deportation order, or otherwise, it shall advise the alien of this decision in writing, explaining the reasons therefor, and promptly provide plaintiffs' counsel with a copy of such decision and copies of the applicant's application, declaration and evidence regarding membership in subclass 1. The alien shall be advised that plaintiffs' counsel has been provided copies of such documents and shall not be removed from the country for a period of twenty (20) days from the date such decision is served on the alien and mailed to plaintiffs' counsel, whichever date is later, during which period plaintiffs' counsel, or their designee, will be allowed to confer with and advise the alien, by telephone or in person, regarding the relief granted to subclass 1 members by this court. If, after said 20-day period, the alien wishes to assert rights as a subclass 1 member, the alien shall submit a statement accompanied by any relevant evidence to the INS. If the INS thereafter refuses to alter its initial determination, the INS' determination shall be treated as a denial of an application for legalization and shall be appealed in accordance with 8 U.S.C. § 1255a(f)(4).

IT IS SO ORDERED.

DATED: August 10, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX A

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHT TO LIVE IN THE UNITED STATES

As a result of a court decision in a case called *Catholic Social Services v. Meese*, you may be allowed to remain in the United States and apply for legalization.

You might have rights under this case if you qualify for legalization *and* if you left for a brief trip, returning any time after May 1, 1987, without INS permission. Your trip must have been for an *innocent* reason(*e.g.*, visting relatives, a business trip, etc.).

In general, to be eligible for legalization, you must have continuously lived in the United States *illegally* since January 1, 1982, other than brief trips outside the United States. You may qualify under this court ruling even if your residence ended in the United States because (1) you were expelled by the INS after May 1, 1987, or (2) you left the country voluntarily, believing that you were not eligible for legalization.

If you did not file a legalization application by May 4, 1988, believing that you did not qualify because of a trip outside the United States after May 1, 1987, you may still file a legalization application, and be permitted to remain in the United States with a temporary work permit. The INS will give you a legalization application to fill out if you request one.

If you are now in the United States, you must also write a declaration stating (1) that you briefly left the United States and returned without INS permission on or after May 1, 1987, (2) how you heard

about the INS' policy which made you ineligible because of your trip outside the United States after May 1, 1987, and (3) because you thought you were ineligible, you did not file an application on or before May 4, 1988.

If you filed a legalization application by May 4, 1988, which was denied because you had made a brief trip outside the United States without INS permission after May 1, 1988, or because you did not file the application within thirty (30) days of the INS starting a deportation hearing against you, the INS will reconsider your application and apply the correct rule.

The INS may try to expel you from the United States even if you have rights under this case. *You may contact one of the following attorneys for assistance if you believe that you may have rights rights discussed in this notice*:

1. Peter Schey, Carlos Holguin or Helen Skiar: (213) 388-8693;
2. Ralph Abascal or Steven Rosenbaum: (415) 864-3405.

If you want to leave the United States even though you think you might benefit from this case, please fill out the information below to show that you received this notice, understand it, and still want to leave the country.

DATE _____

NAME _____ Signature _____

ADDRESS _____

_____

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL.,
PLAINTIFFS

vs.

EDWIN MEESE, III, Attorney General of the United States, DEFENDANT

ORDER GRANTING PARTIAL STAY

[Filed June 24, 1988]

PROPOSED STAY ORDER

In an Order dated April 22, 1988, following extensive briefing and argument by all parties, this Court enjoined defendants from continuing to implement 8 C.F.R. section 245a.1(g). In Orders dated May 3, 1988, the court modified the definition of subclass 1 and granted plaintiffs' motion for summary judgment setting forth detailed findings explaining why 8 C.F.R. section 245a.1(g) is inconsistent with [the] relevant statutory provisions of the Immigration Reform and Control Act of 1986. The court thereafter ordered and received further briefing and argument on the question of "what remedies are available to members of subclass 1 and whether a stay of this court's orders should be granted." On June 10, 1988, the court issued an Order granting relief to subclass 1 members generally requiring the readjudication of legalization applications filed by subclass 1 members in a manner consistent with the court's May 3, 1988, summary judgment order, and permitting certain subclass 1 members to file legalization applications on or before November 30, 1988. The court denied a stay of its order, *inter alia*, because "[m]embers of the subclass continue to be deported and rendered subject to voluntary departure."

On June 17, 1988, plaintiffs filed a motion to modify this Court's June 10, 1988 Order, arguing that it fails to prevent the expulsion of apprehended subclass 1 members. On June 21, 1988, on the basis of the Supreme Court's decision in *INS v. Pangilinan*, OT 1987, No. 86-1992 (June 17, 1988), defendants filed a motion to vacate that portion of the Court's June 10, 1988 Order "which relates to extending the amnesty filing deadline . . . until November 30, 1987 [sic]." Defendants also sought a stay of the same portion of the Court's May 10, 1988 Order pending disposition of their motion to vacate.

On June 23, 1988, the Court held a telephonic hearing and Ordered the plaintiffs, within ten (10) days, to file any opposition they may have to defendants' motion to vacate, and defendants, within ten (10) days, to file any opposition they may have to plaintiffs' motion to modify the Court's June 10, 1988 Order.

In this Order I resolve defendants' request for a stay pending disposition of their motion to vacate a

portion of the Court's May 10, 1988 Order. For the reasons explained below, a partial stay will be issued pending disposition of defendants' motion to vacate or further Order of the Court.

Without deciding the matter, it appears to the Court that it retains the equitable power to remedy the injury caused to subclass 1 members by defendants' unlawful promulgation and implementation of 8 C.F.R. section 245a.1(g). First, *Pangilinan* appears distinguishable on several grounds: (1) the Supreme Court nowhere concludes that the statute in question in *Pangilinan* was violated by the Attorney General; here, the Court has determined that the relevant IRCA statute was clearly violated by the Attorney General; (2) in *Pangilinan* the plaintiffs had several months to apply for naturalization, more than nationals of many other countries had; here, after this Court's April 22, 1988 Order, members of subclass 1 only had a few days to apply for legalization; (3) in *Pangilinan* the Court strengthened plaintiffs' argument in this case regarding application of the equitable tolling doctrine by reference to the application deadline as a "limitations period."

Second, as stated in *Pangilinan*, this Court retains the power to issue relief in the nature of "mandamus or [an] injunction" even assuming, *arguendo*, that it does not possess the equitable power to require INS to accept and adjudicate "legalization" applications until November 30, 1988. The Court's equitable power to remedy the injury suffered by subclass 1 members may be invoked to enjoin the expulsion of class members, and permit their employment. While not granting them the right to apply for "legalization" and all of the statutory benefits attendant that status, subclass 1 members would at least receive a part of

the benefit they were denied because of defendants' unlawful regulation and practice thereunder.

The Court is informed that the parties have attempted to reach agreement on the parameters of a stay order. Defendants have agreed to stay the expulsion of any apprehended person who affirmatively indicates membership in subclass 1 for the next ten (10) days. Plaintiffs however seek a stay Order which would protect from expulsion apprehended subclass 1 members not aware of their rights as class members (i.e. requiring an inquiry by the INS prior to expulsion). For all of the reasons heretofore expressed, and to preserve the *status quo* preventing the improper expulsion of subclass 1 members pending disposition of defendants' motion to vacate, IT IS HEREBY ORDERED that:

1. Paragraphs 3, 4 and 8 of this Court's June 10, 1988 Order are hereby stayed.

2. Pending disposition of defendants' motion to vacate, and plaintiffs' motion to modify this Court's June 10, 1988 Order, defendants, their agents, employees, and successors in office shall not remove under orders of deportation, voluntary departure, or otherwise, subclass 1 members, *except* defendants may remove subclass 1 members who (1) acknowledge, in writing, that they have been advised of the temporary stay of expulsion granted by this Order and still wish to depart the country; or (2) are otherwise subject to expulsion on grounds unrelated to this litigation. In the latter category defendants shall maintain records regarding the alternative basis for expulsion.

3. Defendants shall inquire of aliens apprehended and detained regarding their membership in subclass 1. Defendants need make no inquiry of aliens apprehended by the INS entering or attempting to enter

the United States without inspection or unlawfully through a port-of-entry.

4. In its discretion, the defendants may require subclass 1 members to submit evidence regarding their membership in the class and *prima facie* eligibility for legalization, as set forth in paragraphs 4 and 10 of this Court's May 10, 1988 Order. Subclass 1 members shall be provided a reasonable time of at least twenty (20) days to obtain such evidence as may be required by defendants prior to expulsion from the country.

5. The confidentiality requirements set forth in paragraph 6 of this Court's June 10, 1988, [*sic*] shall apply to any information obtained by defendants from subclass 1 members pursuant to this Order.

6. Defendants shall provide all apprehended or detained aliens identified as subclass 1 members with the names and phone numbers of plaintiffs' counsel Peter Schey and Ralph Abascal, and advise such class members that they may contact plaintiffs' counsel for additional information regarding their rights as class members. IT IS SO ORDERED.

DATED: June 24, 1988

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

Presented by:

/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Jacqueline Ligua, declare as follows:

1. I am employed in Los Angeles, California. My business address is National Center for Immigrants' Rights, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

2. I am over 18 years of age and am not a party to this action.

3. On this day I deposited in the United States Mail in an envelope bearing the requisite postage, express mail, addressed to:

Robert Kendall, Jr.
Office of Immigration Litigation
Civil Division
Department of Justice
601 D Street, Room 8212
Washington, D.C. 20530

and by first class mail to:

Glyndell Earl Williams
Special Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

true and correct copies of the following document(s):

1. Proposed Order Granting Partial Stay

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23d day of June, 1988, in the city and county of Los Angeles, California.

/s/ Jacqueline Ligua

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

ORDER

[Filed Aug. 11, 1988]

On June 22, 1988, defendant in the above-captioned case filed a motion to vacate those portions of this court's order filed June 10, 1988, that relate to the requirement that the INS accept and process applications from subclass 1 members through November 30, 1988. On the same day, plaintiffs filed a motion for reconsideration or, in the alternative, for supplemental relief. On June 24, 1988, this court ordered a partial stay of the June 10, 1988 order, pending disposition of the instant motions.

On August 8, 1988, defendant filed a notice withdrawing his motion and a motion to continue the stay effected by this court's order of June 24, 1988, either pending appeal or pending disposition of a motion for

a stay in the Ninth Circuit. The court's June 24, 1988 order is now VACATED. For the reasons set forth below, defendant's motion for a stay is DENIED, and plaintiffs' motion for supplemental relief is GRANTED.

This court's order of June 10, 1988 was in the nature of an injunction. Fed. R. Civ. P. 62(c) provides this court with discretion to "suspend, modify, restore or grant an injunction during the pendency of an appeal." Thus, plaintiffs' motion for reconsideration or for supplemental relief, which also seeks injunctive relief, is not barred by the pendency of the appeals of that order. Similarly, this court is not precluded from modifying its June 10, 1988 order or lifting the stay imposed on June 24, 1988, by reason of the appeals.

Defendant's motion to vacate was predicated on his contention that the order, insofar as it requires the INS to accept applications for processing until November 30, 1988 (past the May 4, 1988 deadline) is precluded by the Supreme Court's decision in *INS v. Pangilinan*, 56 U.S.L.W. 4645 (June 17, 1988). Accordingly, the court has reviewed the propriety of its injunction in light of *Pangilinan*.[1]

It is simply inconceivable to this court that *Pangilinan* has overturned hundreds of years of Anglo-American jurisprudence in the cavalier manner suggested by the Government's reading of the case.[2] Ac-

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[1] Despite the defendant's withdrawal of its motion, reconsideration of the injunction in light of *Pangilinan* is warranted and authorized. *See* Fed. R. Civ. P. 62(c).

[2] The court believes that plaintiffs' exhibit 0000 contains a reasonably accurate survey of the relationship of law and equity and will not hesitate here to fully explore that relationship. I only pause long enough to note that equity jurisprudence was created to relieve litigants of the strictures of

cordingly, this court reads the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose. I recognize that there is dicta in the case which might suggest that the court is powerless to remedy the harm caused by defendant's violation of the statute. However, an extension of that dicta to the facts of this case would necessarily require a finding that the Court in *Pangilinan* had reversed 200 years of Anglo-American jurisprudence governing the equitable powers of courts to redress injuries for which there is no adequate remedy at law. Such an extension would also raise very serious questions about the scope of the executive's power and the checks on that power when it is exercised in a way that exceeds the boundaries of the law. This court simply cannot believe that the Supreme Court could have intended such sweeping changes in its opinion in *Pangilinan*. Moreover, adopting the Government's argument that only the Congress can rectify the illegal conduct of the executive branch would raise serious separation of powers questions. Indubitably, it has been a traditional, indeed one might say core function, of the judiciary to provide remedies for conduct of the executive branch violating statutes. Common sense suggests that just as a court is to read a statute to avoid constitutional questions, the court ought to read binding precedent, to the degree it can fairly do so, to avoid constitutional issues.

If I am incorrect in my view of *Pangilinan*, however, it is the alternative order of this court that defendant will be barred from excluding deporting, or subjecting to voluntary departure any subclass 1

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law; thus to suggest that equity must conform its decisions to the strictures of the statute applied strictissimi juris would negate the entire purpose of equity.

members who are otherwise eligible for legalization and must grant such aliens work authorizations. Such order will be effective immediately upon the reversal of this court's June 10, 1988 order by any court of competent jurisdiction.

Furthermore, for the reasons set forth in plaintiffs' motion for reconsideration, I find that it is appropriate to require the INS to provide notice to apprehend aliens of their rights under this court's order.

Accordingly, IT IS HEREBY ORDERED that:

1. This court's order of June 24, 1988 is VACATED. All portions of this court's June 10, 1988 order are of full force and effect.

2. Plaintiffs' motion for reconsideration or in the alternative for supplemental relief is GRANTED. This court's order of June 10, 1988 is supplemented by the Supplemental Order I have filed together with this opinion.

3. Paragraph 6 of this court's order of June 10, 1988 is amended to include defendant's counsel in the prohibition on disclosure contained therein.

4. This court's June 10, 1988 order is hereby amended to add the following paragraphs:

3. (a) If the provisions of paragraph 3 requiring defendant to accept applications from members of the class is reversed by any court, defendant is enjoined from removing under orders of deportation, voluntary departure, or otherwise, members of subclass 1, and shall grant work authorization to such persons, except such persons may be so removed who are otherwise subject to expulsion on grounds unrelated to this litigation. Paragraph 3(b)-(g) of this order shall become effective at the same time as this paragraph.

(b) Defendant shall determine whether apprehended and detained persons (other than persons apprehended while attempting to enter the United States who sign voluntary departure agreements), and persons in deportation proceedings, are subclass 1 members, and shall not remove under voluntary departure or deportation orders, or otherwise, any subclass 1 members until they have had a reasonable opportunity, of not less than sixty (60) days, during which time work authorization shall be granted, to demonstrate to defendant that, if they had had the opportunity to apply for benefits pursuant to paragraph 4 of this order, they would have been granted legalization. If they make such a showing, deportation shall be indefinitely stayed and work authorizations granted for the same period of time.

(c) In addition to any other methods of inquiry, apprehended and detained persons, and persons in deportation proceedings, shall be questioned regarding their membership in subclass 1, using the form attached hereto as Appendix "C."

(d) All such apprehended and detained persons, and persons in deportation proceedings, who, upon inquiry as specified in the foregoing paragraph, reveal facts which indicate that they are, or may be, subclass 1 members, or whose INS files indicate that they are members of subclass 1, shall be provided a written notice of this court's orders regarding subclass 1, and the names, addresses and phone numbers of plaintiffs' counsel (attached hereto as Appendix "D"). If such persons, after being provided such notice, indicate that they nevertheless wish to depart the United States, they shall be asked to acknowledge, in writing, receipt of the notice and indicating their desire to depart the country. The address to which they intend to return abroad shall be noted on the

document in which they acknowledge receipt of the aforementioned notice, and copies of such acknowledgements shall be provided to plaintiffs' counsel upon demand.

(e) When giving any of the notices referred to in the appendices of this order, or any other written matter that defendant uses to inform apprehended aliens, the person shall be asked if he or she can read the language in which the notice is written, and if such person indicates the inability to so read, the notice shall be orally read verbatim to such person in the language that the person speaks. The specific notices referred to in the appendices of this order shall be translated into at least the Spanish language and used to give notice to all persons who appear to speak Spanish.

(f) If defendants does not agree with the language or format of the notices contained in the appendices of this order, he shall promptly confer with counsel for plaintiffs and seek to resolve any disagreement informally within ten (10) days of this order, failing which the parties shall present the court with a summary of their disagreements within fifteen (15) days of the date of this order.

(g) If defendant's agents believe that a person who claims to be a subclass 1 member is not a member of the class and is therefore subject to expulsion pursuant to voluntary departure, a deportation order, or otherwise, the person shall be advised of this decision in writing, with an explanation of the reasons therefor, and defendant shall promptly provide plaintiff's counsel with a copy of such decision and copies of all documents relating to the claim of membership in subclass 1. The person shall be advised that plaintiffs' counsel has been provided copies of such docu-

ments and shall not be removed from the country for a period of twenty (20) days from the date such decision is served on the person, and mailed to plaintiffs' counsel, whichever date is later, during which period plaintiffs' counsel or their designee will be allowed to confer with and advise the person, by telephone or in person, regarding the relief granted to subclass 1 members by this court. If, after such 20-day period, the person wishes to assert rights as a subclass 1 member, the dispute shall be submitted to a magistrate of this court for resolution and removal shall be stayed pending such resolution. Such matter will be considered expeditiously so as not to delay any proper removals from the country.

5. Defendant's motion for a stay pending appeal or pending disposition of a motion for a stay by the Ninth Circuit is DENIED.

IT IS SO ORDERED.

DATED: August 9, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX "C"

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHT TO LIVE IN THE UNITED STATES

As a result of a court decision in a case called *Catholic Social Services v. Meese*, you may be allowed indefinitely to remain in the United States and obtain work authorization.

You might have rights under this case if you would have qualified for legalization, even though you did not apply during the application period of May 5, 1987 to May 4, 1988, *and* if you had left for a brief trip, returning anytime after May 1, 1987, without INS permission. Your trip must have been for an *innocent* reason (e.g., visiting relatives, a business trip, etc.).

In general, to be allowed to stay in the United States and receive work authorization, you must have continuously lived in the United States *illegally* since January 1, 1982, other than brief trips outside the United States. You may qualify under this court ruling even if your residence ended in the United States because (1) you were expelled by the INS after May 1, 1987, or (2) you left the country voluntarily believing that you were not eligible for legalization.

You must also sign a declaration under penalty of perjury stating (1) that you briefly left the United States and returned without INS permission on or after May 1, 1987, (2) how you heard about the INS' policy which made you ineligible because of your trip outside the United States after May 1, 1987, and (3) because you thought you were ineligible, you did not file a legalization application on or before May 4, 1988.

If you filed a legalization application by May 4, 1988, which was denied because you had made a brief trip outside the United States without INS permission after May 1, 1987, or because you did not file the application within thirty (30) days of the INS starting a deportation hearing against you, the INS will reconsider your application and apply the correct rule.

The INS may try to expel you from the United States even if you have rights under this case. *You may contact one of the following attorneys for assistance if you believe that you may have rights discussed in this notice*:

1. Peter Schey, Carlos Holguin or Helen Sklar (213) 388-8693;
2. Ralph Santiago Abascal or Steve Rosenbaum (415) 864-3405.

APPENDIX D

FORM ON QUESTIONING APPREHENDED AND DETAINED ALIENS, AND ALIENS IN DEPORTATION HEARINGS, REGARDING *CSS V. MEESE* CLASS MEMBERSHIP

Name of alien ———————————

INS A #———————

1. Do you believe that you qualify for legalization: Yes— No—
2. Did you reside continuously in the United States unlawfully from January 1, 1982: Yes— No—
3. Did you briefly depart the United States for an innocent reason and return without INS permission after May 1, 1987: Yes— No—
4. Did you file an application for legalization by May 4, 1988: Yes— No—
5. Did you fail to file a legalization application by May 4, 1988 because you thought that you were ineligible because you returned to the U.S. after a brief absence sometime after May 1, 1988 without INS permission: Yes— No—

Date ————

Name of Questioning Officer (print): ————————

Alien granted stay of deportation? Yes— No—

If alien believes he or she is eligible for legalization, and appears to be a subclass 1 member in *CSS v. Meese*, and if stay of expulsion not granted, explain why (use a second sheet if necessary):

———————————————————

———————————————————

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-4757-WDK (JRx)

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PLAINTIFFS

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

OPINION AND ORDER RE RELIEF

[Filed Aug. 12, 1988]

On July 15, 1988, this Court issued an Order granting in part plaintiffs' motion for summary judgment and granting in part summary judgment in favor of defendants. At that time, the Court ordered further briefing from the parties related to the relief available to the prevailing plaintiffs. That briefing has been submitted and the parties have had an opportunity to respond to the positions taken by their respective counterparts. Having considered the materials submitted and heard oral argument on August 11, 1988, the Court hereby ORDERS that plaintiffs' request for injunctive relief is GRANTED.

BACKGROUND

When Congress enacted the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 8 U.S.C.A. § 1255a (West Supp. 1988) (IRCA), it provided that all illegal aliens who fall within the various requirements set forth in IRCA must apply for legalization during a 12-month period to be designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A). The time period-designated by the Attorney General began on May 5, 1987 and ended on May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988). Both the statutory language and the regulatory language are mandatory —the alien "must apply" within the designated legalization period.

Despite these time limitations, plaintiffs in subclass one argue that declaratory relief is insufficient to remedy their injury caused by the Immigration and Naturalization Service's (INS) original policy. They contend that since the original policy was in effect between May 1, 1987 and November 17, 1987, they were deprived of roughly half of the twelve-month time period alloted to them in addition to being dissuaded from applying for legalization due to an erroneous, though substantially publicized, regulation.[1] As a consequence, plaintiffs ask this Court to grant them an extension of time to apply for legalization commensurate with the time lost. In order to minimize the tremendous impact of such an extension, plaintiffs ask that a new deadline of November 30, 1988, corresponding with the deadline accorded by Congress to agricultural workers, be created.

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[1] In their response to one request for admission, defendants indicated that, pursuant to the original policy, "it would not have been inconsistent with INS policy for INS employees . . . to advise potential applicants for legalization . . . that they were ineligible for legalization. . . ."

In support of their remedial request, plaintiffs effectively rely on three distinct, though in many ways related, principles. First, they invoke this Court's general equitable powers, arguing that it authorizes an extension of the filing deadline. Second, they contend that the INS' conduct equitably estops the agency from relying on the statutory time limit created by Congress. Finally, plaintiffs assert that the 12-month limitations period may be equitably tolled to permit further filings of legalization applications.

If plaintiffs prevail on any of these remedial theories, they further request that the INS be ordered to publicize the fact of additional time granted by the Court.

DISCUSSION

The statutory requirement that an alien apply for an adjustment of status during the 12-month period designated by the Attorney General is a jurisdictional requirement and not simply a statute of limitations. Section 1255a(a) sets forth a number of "requirements" for eligibility for legalization. An alien must establish a continuous unlawful residence in the United States since January 1, 1982, *see* 8 U.S.C.A. § 1255a(a)(2), a continuous physical presence in the United States since November 6, 1986, *see* 8 U.S.C.A. § 1255a(a)(3), and his admissibility as an immigrant. *See* 8 U.S.C.A. § 1255(a)(4). One additional requirement of the statutory scheme, indeed the first requirement, is that the alien "must apply for . . . adjustment during the 12-month period beginning on a date . . . designated by the Attorney General." 8 U.S.C.A. § 1255a(a)(1)(A).

When it denominated the timely application a "requirement" and listed it first among various other

requirements for eligibility, Congress expressly made § 1255a(a)(1)(A) a jurisdictional provision instead of a statute of limitations. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982). Because § 1255a(a)(1)(A) is a jurisdictional requirement, "[t]he government may not be equitably barred from asserting [it]." *Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987) (quoting *McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986)), *cert. denied sub nom. Lee v. Eklutna*, 108 S.Ct. 772 (1988). Thus, as a jurisdictional limitations period, § 1255(a)(1)(A) may not be equitably tolled and the government may not be equitably estopped from relying upon it.[2]

Plaintiffs' reliance on the doctrines of equitable estoppel and equitable tolling is further undermined by their failure to demonstrate affirmative misconduct by the INS. *See INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam).[3] Mere affirmative conduct will not support equitable estoppel against the government; the challenged action must constitute affirma-

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[2] Because the timely filing requirement of § 1255a(a)(1)(A) is jurisdictional, the cases cited by plaintiffs which involve merely statutes of limitation are inapposite.

[3] Most cases in which equitable estoppel is asserted against the government involve the questionable acts of an individual government official rather than the official acts of a government agency. Despite this factual distinction, plaintiffs must nevertheless establish that responsible officials at the INS engaged in affirmative misconduct when they caused to be promulgated an initial regulation which this Court has held to be "inconsistent with Congress' intent when it enacted IRCA." *League of United Latin American Citizens v. INS*, No. CV 87-4657-WDK (JRx), slip op. at 15 (C.D. Cal. July 15, 1988).

tive *mis*conduct, and such misconduct does not contemplate simple negligence. *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985). Affirmative misconduct must also be demonstrated to invoke equitable tolling against the government. *See, e.g., Gibson v. United States*, 781 F.2d 1334, 1344-45 (9th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 928 (1987); *Hyatt v. Heckler*, 807 F.2d 376, —— (4th Cir. 1986), *cert. denied sub nom. Bowen v. Hyatt*, 108 S.Ct. 79 (1987).

Many cases apparently construe misconduct to involve some type of intentional or active "misrepresentation" or "concealment," *see, e.g., Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988); *United States v. Harvey*, 661 F.2d 767, 775 (9th Cir. 1981), *cert. denied*, 459 U.S. 833 (1982); *United States v. Ruby Co.*, 588 F.2d 697, 704 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), or a "deliberate lie" or "pattern of false promises." *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986). No such malfeasance has been demonstrated or even alleged by plaintiffs and cannot be presumed simply because the INS promulgated regulations which have been held to be invalid. *See INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *United States v. Browning*, 630 F.2d 694, 703 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981). *See also* Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1026, 1044-47 (1986).

What remains to be considered is whether this Court, when fashioning the equitable relief requested by plaintiffs in subclass one, may, despite the foregoing restrictions, enjoin the INS from refusing to accept and process legalization applications of those aliens who legitimately fall within subclass one.[4]

Defendants invoke language in *United States v. Ginsberg*, 243 U.S. 472, 474 (1917), to the effect that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." The issue is not, however, as defendants then assert, "whether this Court has the power to ignore the express words of the statute. . . ." The express words of the statute are that an alien must apply for legalization "during the *12-month* period" designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A) (emphasis added).[5] De-

[4] Plaintiffs' failure to satisfy what this Court has denominated as a jurisdictional requirement—the timely filing of a legalization application—does not divest this Court of subject matter jurisdiction. Obviously, this Court would lack subject matter jurisdiction to review the denial of an individual adjustment of status as authorized by § 1255a(f) where the alien had failed to timely file an application. *Cf. Lee v. INS*, 685 F.2d 343 (9th Cir. 1982) (per curiam); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). That, however, is not the question presented by this lawsuit. Instead, plaintiffs in subclass one complain that they have not been provided with an opportunity to apply for legalization and thus satisfy this jurisdictional requirement because the INS promulgated regulations inconsistent with congressional intent, and they seek appropriate relief for the harm caused by that error. This Court clearly has subject matter jurisdiction to consider this challenge.

[5] Defendants also argue that injunctive relief is improper because Congress voted on April 28, 1988 not to extend the

fendants effectively designated a six month period for applications by those who fall within subclass one. It is the INS, therefore, which failed to obey the express words of the statute.

In essence, plaintiffs in subclass one ask that the INS be compelled to do what Congress has instructed: to designate a full 12-months during which they may apply for legalization. Rather than ignoring the express words of Congress, plaintiffs in subclass one seek to abide by them by applying within that 12-month period because, according to the class definition, they were dissuaded from doing so by the original INS policy and the fact that they did not learn of the policy's modification until too late.[6] Consequently,

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12-month deadline in the face of various judicial challenges to INS regulations and other confusion. *See* 134 Cong. Rec. S5043 (daily ed. April 28, 1988). This congressional action does not have the dispositive significance which defendants seek to attribute to it. Congress did not vote or otherwise express a desire to preclude courts from rectifying regulatory inconsistencies with its policies as manifested in IRCA for those individuals who have been injured by those policies. All Congress did was to affirm its 12-month application period as it relates to all aliens, whether or not they have been injured by those policies.

[6] The factual question of the extent of the INS' publicity of its modified policy neither precludes summary judgment regarding plaintiffs' requested relief nor supports defendants' position that the requested relief is unwarranted. Subclass one is comprised of "all persons who qualify for legalization but who were deemed ineligible for legalization . . . who learned of their ineligibility on or after May 1, 1987 but did not learn about INS' modified policy . . . and, relying upon information that they were ineligible, did not apply for legalization on or before May 4, 1988." Thus, no matter how extensive the publicity, these plaintiffs, by definition, did not learn of the change. The extent of the publicity is therefore irrelevant.

the fundamental premise of defendants—*viz.*, that the applications of these plaintiffs are late and thus their consideration would dispense with one requirement for legalization—is simply incorrect. The applications are not "late" because the aliens in subclass one were not given the statutorily prescribed 12 months in which to apply for legalization.

Defendants rely heavily on *INS v. Pangilinan*, 108 S.Ct. 2210 (1988), for the proposition that permitting plaintiffs to apply for legalization would be in contravention of public policy as expressed by Congress and therefore impermissible. Defendants read *Pangilinan* much too broadly. The Supreme Court held that where an alien has "no statutory right to citizenship," even a court sitting in equity may not confer citizenship upon that alien for equitable reasons. *Id.* at 2215-16. The Court premised its decision on the plain fact that Article I, § 8 of the Constitution permits only Congress to grant citizenship and thus where an alien does not qualify under the terms set forth by Congress, a court may not nevertheless grant citizenship by ignoring those terms. *Id.* at 2215.

This case differs from *Pangilinan* in four very important respects. First, plaintiffs here rely upon a statutory violation to support their claim for equitable relief. Second, the failure of the INS properly to adhere to the provisions of IRCA indicates that the INS' position is not " 'enforcing the public policy established by Congress.' " *Id.* at 2215 (quoting *Hibi*, 414 U.S. at 8). Third, unlike the statute involved in *Pangilinan*, by which Congress itself established the cut-off date, IRCA merely creates a 12-month period to apply for an adjustment of status. The congressional policies differ because the former creates a final date after which Congress did not wish applica-

tions to be heard, whereas the latter focuses on a specific period of time to be allotted to legalization applications. Finally, the Supreme Court expressly distinguished the inability of a court to confer citizenship with a court's traditional equitable powers such as injunctive relief. *See id.* at 2216 ("More fundamentally, however, the power to make someone a citizen of the United States has not been conferred upon the federal courts, like madamus or injunction, as one of their generally applicable equitable powers.").[7]

Plaintiffs in subclass one do not propose that this Court grant them citizenship. *Pangilinan* suggests that even where an executive agency fails to comport with congressional policy, this form of relief is unavailable. What is available, however, and what these plaintiffs seek, is an order enjoining the INS from denying them the opportunity to apply for an adjustment of status on timeliness grounds when the untimeliness resulted from the INS' erroneous policy. This relief is meaningfully different from the relief sought in *Pangilinan* because all that is being granted here is the right to apply for an adjustment of status with the attendant possibility that the application may properly be denied.

The Court is not unaware of the fact that many illegal aliens who fall without subclass one and some of those who counsel them will view this ruling as an opportunity to gain entry into the United States by

[7] This equitable relief would be available irrespective of whether this case is a suit at law or in equity. *See* Fed. R. Civ. P. 2; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1043, at 138 (1987).

falsely declaring reliance on the INS' original policy. This inevitability cannot, however, foreclose the benefits of the congressional legalization mandate set forth in § 1255a(a)(1)(A) for those who did legitimately rely on INS statements. The Court is confident that those charged with determining reliance on the initial INS policy in individual cases will consider very carefully the claims of those who seek to avail themselves of this decision.

Accordingly, IT IS HEREBY ORDERED that summary judgment regarding the relief available to plaintiffs in subclass one shall be entered in favor of plaintiffs in subclass one,

IT IS FURTHER ORDERED that the INS is enjoined from refusing to accept applications for an adjustment of status of those aliens who fall within subclass one, beginning immediately and ending November 30, 1988, or, if defendants seek and are granted a stay of this Order, and if this Court's Order is thereafter affirmed by the Ninth Circuit, for a period of 120 days after such affirmance, PROVIDED that the alien contemporaneously provide a sworn affidavit attesting that he or she falls within subclass one, and PROVIDED FURTHER that if an alien is represented by counsel, counsel shall provide a sworn affidavit that to the best of his or her knowledge after reasonable inquiry, the alien meets the requirements of subclass one,

IT IS FURTHER ORDERED that the INS shall, consistent with the evidentiary requirements and standards of proof set forth in IRCA, and within two weeks from the date of this Order, establish appropriate procedures to determine whether an applicant

claiming to fall within subclass one indeed legitimately does,

IT IS FURTHER ORDERED that the INS shall, in cooperation with qualified designated entities, take reasonable steps to disseminate this Court's ruling to aliens who may fall within subclass one. This dissemination shall include, but not necessarily be limited to, notifying qualified designated entities and issuing press releases to the INS press list immediately upon development of the procedures for determining eligibility,

IT IS FURTHER ORDERED that any illegal alien apprehended by INS enforcement officials who claims to fall within subclass one shall, in lieu of immediate deportation, be given adequate time to apply for legalization, and

IT IS FURTHER ORDERED that this Court shall continue to retain jurisdiction to assure that this Order is carried out fully and completely and to provide such other and further relief or modifications as may be necessary.

IT IS SO ORDERED.

DATED: August 12, 1988

/s/ William D. Keller
WILLIAM D. KELLER
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046,
88-15127,
88-15128

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

v.

WILLIAM P. BARR, Attorney General of the United States,[1]
DEFENDANT-APPELLEE/CROSS-APPELLANT

No. 88-6447

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC,), ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT-APPELLANT

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[1] Attorney General Barr is substituted for former Attorney General Thornburgh pursuant to Fed. R. App. P. 43(c)(1).

MOTION FOR STAY AND RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF MANDATE

The Attorney General of the United States and the Immigration and Naturalization Service (INS) respectfully move this Court for a stay in the above-captioned cases. This motion asks the Court (1) to stay its mandate, and (2) to order that the INS need not accept further legalization applications or process existing applications pending the Supreme Court's disposition of the cases.

The fundamental reason for this motion is that, even though Congress intended the filing period for legalization applications to last only one year, and even though the district courts ordered extensions of no more than six months, members of the plaintiff classes in these cases have now had nearly *FOUR EXTRA YEARS* to file amnesty applications. The operation of the stay orders previously entered in these cases has therefore given plaintiffs an extraordinarily ample and generous time within which to file applications. On the other hand, the extension of time has greatly burdened the government. It has caused a very significant problem of fraudulent applications, and it has imposed severe financial and administrative burdens on the INS, which continue to irreparably impair the ability of the Service to perform its normal functions. Accordingly, the balance of the equities at this stage of the case heavily favors granting a stay to the government.

I. STATEMENT

These cases concern the alien legalization program created by the Immigration Reform and Control Act of 1986 (IRCA or Act). The Act allowed certain

aliens unlawfully present in this country to have their status adjusted to that of an alien lawfully admitted for temporary residence, if they filed an application for such adjustment within a twelve-month period beginning on a date fixed by the Attorney General (which date had to be no later than 180 days after the enactment of the Act). 8 U.S.C. § 1255a(a)(1). The Attorney General fixed the period to be the twelve months ending on May 4, 1988. 8 C.F.R. § 245a.2(a)(1).

Each of these two cases in a class action concerning regulations that the INS issued to interpret the requirements that aliens had to satisfy to be eligible for legalization under IRCA. *See Catholic Social Services, Inc. v. Thornburgh*, Nos. 88-15046 et al., slip op. at 1510, 1513. In each case, it was held that the INS's regulation was not a permissible interpretation of the statute. *Id.* at 1511, 1514. The district courts, in each case, ordered as a remedy that the INS extend the period during which aliens could apply for legalization until November 30, 1988. *Id.* at 1512, 1514. In the *CSS* case, this represented a six-month extension; in the *LULAC* case, it represented a four-month extension.

The government appealed both cases to this Court. This Court ordered expedited briefing and argument in the *CSS* case. Argument was held on November 18, 1988. *Id.* at 1505. The Court later consolidated the two cases and received briefs from the parties in the *LULAC* case without holding further argument. *Id.* at 1515.

During the pendency of the appellate litigation, the district courts' orders were each subject to a stay. In each case, the terms of the stay provided that the INS was obliged to grant temporary work authorizations and stays of deportation to any class member

whose application made a prima facie showing of eligibility for legalization. *See* Attachment B1, ¶ 2; Attachment B5, ¶¶ 1-2; Attachment C, ¶ 3(b), (e). The INS was not, however, obliged to process legalization applications while appeal was pending.

On February 13, 1992, this Court issued its opinion in the two cases. The Court affirmed the judgments of the district courts. Noting that the time periods specified in the original injunctions had expired, the Court remanded the cases so that the district courts could revise the time periods to provide for equivalent extensions of the application period. *CSS*, slip op. at 1523, 1525.

In response to a government motion, the Court extended the government's time to seek rehearing of its order until March 26, 1992. After due consideration of the urgency of the cases, the Solicitor General has decided not to seek rehearing from this Court, but to proceed directly to seek a writ of certiorari from the Supreme Court, and to file this motion seeking a stay pending Supreme Court action.

II. JUSTIFICATION FOR A STAY

A stay pending certiorari is appropriate when there is a reasonable probability that certiorari will be granted, a significant possibility that the judgment will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if a stay is not entered. *See Barnes v. E-Systems, Inc.*, 112 S. Ct. 1, 2 (1991) (Scalia, Circuit Justice). Assuming these requisites are met, a court should enter a stay if the balance of the equities makes such a stay appropriate. *Id.* at 3.

As we shall now show, the stay orders that were in effect pending this Court's decision have significantly altered the balance of the parties' legitimate interests

in these cases. Three key factors have altered the balance of interests that originally supported the entry of the stay orders: first, as a result of the stay orders, genuine class members entitled to relief under the district courts' original orders have now had an extraordinarily generous period of time within which to file their applications. Second, because of widspread fraud now associated with the legalization program, the benefits of the stay orders are primarily being sought by aliens who are not members of the plaintiff classes. Finally, the stays have posed an extreme financial and administrative burden on the government, which has made INS far less able to perform its normal operations. Accordingly, the balance of equities in this case now favors the government.

Furthermore, the prerequisites for a stay are met. As we shall show, there is a reasonable probability that certiorari will be granted in these cases, and a significant possibility that the judgment will be reversed. If this Court's mandate issues and the district court proceeds to implement its original orders, the government will be exposed to the irreparable harm of six further months of disruption of the INS's operation. In light of these factors and the balance of interests involved, a stay in favor of the government pending Supreme Court action on the cases is now appropriate.

A. The Operation of the Existing Stay Orders Has Significantly Altered the Balance of the Parties' Legitimate Interests.

1. *Extraordinary Relief Provided to Class Members.*

The district courts' original injunctions in these cases ordered the government to extend the time period for class members to file applications for an extra four

months (in the *LULAC* case) or six months (in the *CSS* case). As a result of the stay orders that governed the cases while this appeal was pending, however, aliens have had, as of the date of this motion, an extra *three years, ten months, and twenty-two days* within which to file their applications.

The "interim" relief provided by the stays has, therefore, entirely overwhelmed the relief that the plaintiffs originally won in the district court. The effect of the stays has been to provide aliens with an additional period nearly four times as long as the application period originally granted to them by Congress, and eight or twelve times as long as the additional periods ordered by the district courts. Genuine class members who are truly entitled to relief under the district courts' orders have thus had an extraordinarily ample and generous time within which to present their applications.

2. *Fraudulent Applications.*

Furthermore, the benefits of the extension of the legalization program are at this time primarily being sought by aliens who are not members of the plaintiff classes. The INS has observed that nearly 90 percent of the applications currently being filed are from non-class-members or are fraudulent. *See* Declaration of James A. Puleo ("Puleo Decl.") ¶ 4a (Attachment A). This problem is hardly surprising, since most genuine class members probably filed their applications long ago.

This problem has been exacerbated by the generous evidentiary requirements of the stay orders. Under the terms of the stays, an alien does not have to produce the same kind of evidence that would be needed to qualify for legalization under IRCA. The alien need

only show "prima facie" eligibility for legalization. *See* Attachment B1, ¶ 4; Attachment C, ¶ 3(f). Thus, aliens have been able to show eligibility for relief under the stays pursuant to a far less demanding evidentiary standard than will ultimately apply to their applications for adjustment.

Indeed, the 90 percent figure given above is the percentage of applicants that are immediately recognizable as failing the prima facie test. The remaining 10 percent are merely those whose applications suffice under the prima facie evidentiary standard. The vast majority of these will probably turn out not to be eligible for adjustment when their applications are reviewed under a more rigorous standard. Puleo Decl. ¶ 4a.

The benefits available under the extension of the legalization program have created a market in which certain attorneys and middlemen arrange for the submission of fraudulent applications. Such "facilitators" are charging aliens between $1,000 and $6,000 for the preparation of fraudulent documents. Puleo Decl. ¶ 4a. In many cases, INS has observed that unrelated aliens are simply submitting a near duplicate of a single set of documents previously submitted by other aliens. *Id.* at ¶ 4a. Vendors are simply selling packaged documents to ineligible aliens who are willing to pay the price. *Id.* Obviously, these documents are fraudulent.

Not only does this mean that aliens who are not class members are applying for the benefits of the extended program, but fraud has also become a significant law enforcement problem. INS has been forced to launch a major investigative initiative to attempt to protect itself from frauds. INS has opened over 40 investigations involving 200 facilitators and thousands of applications. *Id.* at ¶ 4b. These investigations have re-

sulted in 145 arrests or indictments and 42 convictions. *Id.* INS's investigative section has been unable to keep up with the level of fraud that is now associated with the legalization program. *Id.*

3. *Burden on the Government.*

Finally, the extended applications period has imposed an extreme burden on the INS and is irreparably harming INS's ability to conduct its normal operations. During the almost four years that stays have been in effect, the INS has received approximately *three hundred thousand* applications for legalization. Puleo Decl. ¶ 3. Additional applications are still arriving at an average rate of about 1,200 per week. *Id.* The task of dealing with these applicants, the vast majority of whom do not appear to be eligible for legalization, is overwhelming INS's personnel and financial resources and is forcing INS to divert vital resources from other areas. *Id.* at ¶ 5.

The financial burden of dealing with the applications has been considerable. IRCA's legalization program was originally intended to be self-funding. The INS was able to maintain the considerable staff necessary to implement the program only because the fees required of applicants were sufficient to cover costs. *Id.* at ¶ 6a. The stay in the *CSS* case, however, prohibits the INS from requiring aliens to tender the normal application fee with their application. As a result, the INS has been deprived of about $44,000,000 for use in dealing with applications. *Id.* at ¶ 6b. The agency has therefore had insufficient funds with which to continue the legalization program. *Id.* at ¶ 6c.

Because of this shortfall, and because of the administrative demands of handling these applications, INS has been forced to reduce the resources it devotes to

other aspects of the legalization program. For example, of the 1.9 million aliens that applied for legalization during the original, congressionally-fixed applications period, INS still has over 55,000 who are now scheduled to have "Phase II" interviews (that is, interviews regarding their applications to have their status adjusted from that of temporary resident to permanent resident), and over 52,000 who have been approved for Phase II but have not yet filed for adjustment. *Id.* at ¶ 5b. District offices have been instructed to maintain processing of Phase II applications, but in order to have sufficient resources to deal with applications in the *CSS* and *LULAC* cases, district offices have been forced to reduce public inquiries, employment authorization extensions, the granting of permission of aliens to leave the United States temporarily, and all other services relating to the original legalization program. *Id.* The need to deal with *CSS* and *LULAC* applicants is therefore redounding to the detriment of those aliens who filed before the original, May 4, 1988 deadline.

The press of *CSS* and *LULAC* applicants has also forced INS to reduce certain of its services regarding aliens in general. For example, INS has been forced to divert personnel from adjudicative services such as naturalization. *Id.* The stay orders have thus rendered INS less able to provide its normal level of services to aliens.

INS originally planned its implementation of IRCA's legalization program with the intended one-year life of the program in mind. *Id.* at ¶ 5a. Many of the program's resources, such as leased offices, data processing services, and temporary personnel, have been or are being terminated. After April, 1992, only two full-time legalization offices will remain open (of

the 109 open at the start of the program). The legalization program has ceased to be a distinct part of INS. *Id.* As a result, the burden of dealing with the remaining applications and applicants will fall, as it has already begun to fall, on INS's district offices as part of their regular functions. *Id.* This burden will further reduce the ability of these offices to provide services to aliens and conduct their normal operations.

4. *The New Balance of Interests.*

The existing situation is intolerable. Requiring INS to continue accepting applications will most likely have the effect of inappropriately benefiting aliens who were never eligible under IRCA's legalization program, at the cost of diluting the resources that INS has available to provide services to aliens who are genuinely eligible for them. Given the nearly four-year extension of the application period that has already occurred, it seems very unlikely that there are any aliens remaining who have lived in the United States illegally since 1982 and who are eligible for relief under the district courts' orders, but who have not had a fair opportunity to apply for it. The balance of the equities in the case therefore favors the government.

B. The Prerequisites for a Stay are Met.

1. *There is a Reasonable Probability that the Supreme Court Will Grant Certiorari, and a Significant Possibility that the Judgment Will Be Reversed.*

As this Court's opinion itself noted, there is a conflict between this Court's opinion and the opinion of the D.C. Circuit in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991). *See CSS*, slip op. at

1519 (this Court declines to follow *Ayuda*). For this reason, and because of the importance of the case, there is certainly a reasonable probability that the Supreme Court will grant certiorari.

Furthermore, although we realize, of course, that this Court has ruled against the government, we respectfully submit that there is a significant possibility that the Supreme Court will reverse this Court's judgment. The Supreme Court's decision in *INS v. Pangilinan*, 486 U.S. 875 (1988), held that courts cannot extend statutory deadlines for aliens to file applications with the INS. While this Court found *Pangilinan* to be distinguishable from the present case, we respectfully submit that, at the very least, the question is of sufficient difficulty that there is a significant possibility that the Supreme Court will rule differently.

2. *Assuming the Correctness of the Government's Position, There is a Likelihood of Irreparable Harm if a Stay is not Granted.*

If the stay requested by the government is not granted, and the case is returned to the district courts for implementation of their orders, irreparable harm will be imposed on the government. The filing of applications will continue to overwhelm the INS's district offices and to significantly dilute their ability to implement their normal missions of providing servces to aliens, as was detailed above. INS will be obliged to devote still further resources for the publicity campaign required by the district court's order in *CSS*. If INS is required to *process* existing applications, its adjudicatory processes will be likewise overwhelmed, and the processing will lead to grants of residency that will later have to be rescinded if

the Supreme Court ultimately decides the case in the government's favor. Puleo Decl. ¶ 7.

Assuming the correctness of the government's position, all of these INS resources will have been expended purposelessly. If the Supreme Court ultimately reverses this Court's judgment, INS will have devoted its resources to the receipt and handling of thousands of applications that it should never have been required to receive. Because of the very significant impact that these appilcations are having on the Service's ability to perform its normal functions with its limited resources, this irreparable harm is substantial.

Furthermore, in light of experience under the existing stay orders, the likelihood is that the vast majority of applications filed will be fraudulent or otherwise from aliens who are not members of the plaintiff classes, and that the benefit of the new application period will go to such aliens. Fraudulent applications will also continue to pose a significant law enforcement problem.

C. *The Requested Stay.*

In light of the foregoing factors, an appropriate balancing of the interests of the parties and of the public would require that INS not be obliged to accept further legalization applications pending Supreme Court review of these cases. Accordingly, the government requests that this Court stay its mandate pending the Supreme Court's disposition of the case, and, furthermore, that the Court order that the INS not be required to accept further applications during that period. We attach a draft of the order the government requests.

We emphasize that the government is *not* simply asking that the Court stay its mandate. Such a stay

would continue pending Supreme Court action the same increasingly intolerable situation that has existed for the last four years. In order to grant the government appropriate interim relief pending Supreme Court review, this Court should not only stay its mandate, but should also modify the existing stays, by ordering that INS need not accept further applications.

III. RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF MANDATE

On March 2, 1992, the plaintiffs moved for the issuance of this Court's mandate notwithstanding any petition for rehearing that the government might file. The plaintiffs alleged that issuance of the mandate was necessary "to protect class members from irreparable injury during the pendency of any petition for rehearing defendants may eventually file." Plaintiffs' Motion at 1.

Since the government has not filed a petition for rehearing, we respectfully suggest that the plaintiff's motion is moot. If the Court grants the government's motion for a stay, then, of course, its mandate will not issue; if the Court denies the government's motion, then its mandate will issue (in the absence of Supreme Court intervention). In either case, there is no need to rule on the plaintiffs' motion, which was designed primarily to guard against a lengthy, automatic stay of this Court's mandate pending the consideration of a petition for rehearing.

Furthermore, we note that the plaintiffs' motion for the issuance of the mandate consists largely of repetition of allegations against the INS that have previously been brought to this Court's attention and refuted in connection with the plaintiffs' August 20,

1990 motion for modification of the stay orders, which this Court denied. Plaintiffs allege that class members arrested by the INS are not being questioned regarding their membership in the class. This allegation was made in the plaintiffs' August 20, 1990 motion in this Court. *See* Motion to Modify Stay Orders and Opposition to Defendants-Appellants' Motion to Vacate Stay Orders at 12. As the government noted in its response (filed September 10, 1990), INS has instructed its field officers on several occasions to comply with this aspect of the *CSS* stay order. *See* Reply to Opposition to Government's Motion to Modify Stays and Opposition to Plaintiffs' Cross-Motion to Modify Stays at 19; *see also* Puleo Decl. ¶ 8.

Plaintiffs also allege that class members are routinely denied stays of deportation and temporary employment authorization "without explanation and despite their clear membership in the class." Again, the government's September 10, 1990 filing described in detail the INS's efforts to ensure that the standards and procedures required by the stays are observed by the personnel in the INS's officers throughout the country. *See* Reply to Opposition to Government's Motion to Modify Stays and Opposition to Plaintiffs' Cross-Motion to Modify Stays at 14-19; *see also* Puleo Decl. ¶ 9. The plaintiffs' allegation amounts to no more than a difference of opinion as to whether aliens in particular cases have demonstrated membership in the plaintiff class.

Finally, plaintiffs allege that aliens who travel outside the United States after being found to be class members are not being readmitted. This is in some cases true, but it does not show anything wrong with INS's operations. INS is simply treating the aliens who have applied under the *CSS* and *LULAC* stays

like any other aliens who have applied for legalization under IRCA but who have not yet been granted temporary residence status. Such aliens require advance permission before they may leave the country and return. *See* 8 C.F.R. § 245a.2(m)(1). Therefore, INS is lawfully refusing to readmit aliens who have not obtained such advance permission.

Accordingly, this Court should deny the plaintiffs' motion or dismiss it as moot.

IV. POTENTIAL NEED TO CLARIFY THE COURT'S OPINION

Finally, we would like to call the Court's attention to a statement in its opinion that, we respectfully suggest, may require a slight clarification. At the end of its opinion, the Court, having held that the district courts had power to extend the statutory deadline for filing an application, stated, "[b]ecause the initial time period provided in the injunctions has expired, the actions are remanded to the district courts to revise the injunctions to provide an equivalent extension of the application period." Slip op. at 1523. The Court's final order was that the judgments were "affirmed and remanded for adjustment of time periods specified in the injunctions." Slip op. at 1525.

We respectfully suggest that there is no need for the district courts' orders to be adjusted. The district court's order in each case already provides for the possibility that the order would be stayed, an appeal taken, and the judgment later affirmed. The order in *CSS* required the government to accept applications until November 30, 1988, or, if the order was stayed and thereafter affirmed by this Court (as it was), for a period of 180 days after affirmance. Attachment D at 4, ¶ 3. The order in *LULAC* similarly required the

government to accept applications until November 30, 1988, or, if the order was stayed and thereafter affirmed by this Court (as it was), for a period of 120 days after affirmance. Attachment E at 9.

Accordingly, we respectfully suggest that, regardless of whether the Court grants our motion for a stay of its mandate, it may wish to clarify its opinion to provide simply that the judgments at the district courts are affirmed. Such a clarification would have the salutary effect of providing certainty with regard to what the government's obligations now are under the orders that have been affirmed.

CONCLUSION

For the foregoing reasons, the government's motion for a stay should be granted. The government requests that the Court enter the attached order.

Respectfully submitted,

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ORDER

On consideration of the plaintiffs' motion for issuance of mandate, and the defendants' response thereto, and the defendants' motion for a stay, and the plaintiffs' response thereto, IT IS ORDERED:

1. The mandate of this Court in these cases is stayed pending the timely filing of a petition for a writ of certiorari. If the petition is granted, the mandate shall remain stayed pending the Supreme Court's disposition of the cases.

2. During the pendency of the Supreme Court's consideration of the cases, the government shall not be obliged to accept legalization applications. The government also shall not be obliged to process existing legalization applications filed in connection with these cases.

3. The government shall maintain all existing work authorizations and stays of deportation previously granted in connection with these cases, except as permitted by the stay orders previously entered in these cases.

4. This order shall expire when the Supreme Court issues its mandate in the above-captioned cases.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 1992, I served the foregoing motion by causing true copies to be mailed by overnight courier to:

Peter A. Schey, Esq.
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ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
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DEFENDANT-APPELLANT

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[1] Attorney General Barr is substituted for former Attorney General Thornburgh pursuant to Fed. R. App. P. 43(c)(1).

DECLARATION OF JAMES A. PULEO

I am James A. Puleo, Associate Commissioner, Examinations, Immigration and Naturalization Service (INS). My duties include oversight and management of the legalization program created by the Immigration Reform and Control Act of 1986 (IRCA). This declaration is submitted in support of the government's request for a stay pending disposition of these cases by the Supreme Court. The information set forth in this declaration is known to me through the course of my official duties.

1. Pursuant to stays in place since 1988, the INS has been required to grant employment authorizations and stays of deportation to members of the plaintiff classes in these cases for nearly four years beyond the original May 4, 1988 deadline for the filing of legalization applications. With the assistance of Qualified Designated Entities, INS has widely publicized information on the application process in immigration publications and ethnic newspapers.

2. The government requests (1) that it not be required to continue accepting applications and (2) that it not be required to process existing applications, pending Supreme Court action. INS will continue to extend work authorizations and stays of deportation of prima facie class members whose applications have already been received, but, for the reasons set forth below, it is critical that a stay be issued to cut off INS's obligation to continue accepting applications.

3. In the early months of the implementation of the existing stay orders, only small numbers of aliens came forward to file applications. However, since November 1989, INS has been faced with an increasing number of aliens seeking benefits under the stays.

Since the time the stays went into effect in August, 1988, nearly 300,000 applications have been received. Currently, INS is receiving an average of 1,200 applications per week.

4. At this time, INS is experiencing a major problem of fraudulent applications being filed by aliens claiming to be class members.

a. INS has found that nearly 90 percent of the applications currently being received are not from class members or are fraudulent. Although the remaining applications demonstrate prima facie eligibility, the vast majority of them will probably prove insufficient to establish eligibility when they are actually adjudicated. INS has discovered that vendors are openly selling packaged documents to ineligible aliens willing to pay the price. This is evidenced by numerous unrelated aliens appearing at the same office with nearly identical documents.

b. Fraudulent applications have imposed a significant law-enforcement burden on the Service. INS has been forced to launch a major investigative initiative to attempt to control massive third-party operations designed to defraud INS and individual aliens. By February, 1992, 40 investigations had been opened. These investigations involve 200 "facilitators" (persons who assist aliens in filing fraudulent applications) and thousands of applications. They have resulted to date in 145 arrests and/or indictments, and 42 convictions. INS's investigative section, which to date has expended over $145,000 for undercover "buy" operations, cannot begin to keep up with the level of fraud now associated with the legalization program.

c. The investigations have revealed that facilitators charge from $1,000 to $6,000 to prepare a fraudulent application for filing. (One investigation,

which resulted in the closing of a Qualified Designated Entity in Manhattan, established that they were charging $3,000 to file.) INS has witnessed a rapid growth in the number and sophistication of the perpetrators, probably due to the huge amount of money being made on these schemes. Because the employer sanctions provisions of IRCA (8 U.S.C. § 1324a) make it unlawful to hire an alien unless INS has issued employment authorization, undocumented aliens have a strong incentive to participate in these fraudulent schemes. Our investigations reveal that aliens are seldom advised that they are engaged in fraud and are rarely if ever told that this is merely the first step in a process that they have no prospect of completing.

5. In addition to the fraud problem, the sheer number of the applications threatens to consume the limited legalization program resources and paralyze INS's normal functions. The additional volume of applications is coming at a time when INS is faced with diminishing financial and personnel resources in the legalization program.

a. The legalization program was originally planned with its temporary duration in mind. Of the original 109 legalization offices staffed by 2,000 employees, only eight remain open today, and only two will be open after April, 1992. The legalization program will cease to be a distinct unit of INS at that time. Tasks relating to legalization therefore have devolved and will further devolve on ordinary district offices of INS as part of their regular functions.

b. In order to meet the demands of the *CSS* and *LULAC* applicants, district offices have had to reduce their services provided to aliens who applied for legalization during the original, congressionally-imposed filing period, and also the normal services pro-

vided to aliens in general. Of the 1.9 million section 245a aliens who applied for legalization during the original 12-month period, there are still 55,800 now scheduled for "Phase II" interviews (Phase II is the process by which an alien has his or her status adjusted from that of an alien admitted for temporary residence to that of an alien admitted for permanent residence). Another 52,400 (approximately) have been approved for Phase II but have not yet filed for adjustment, and another estimated 40,000 are still open under Phase I. While all district offices have been instructed to maintain processing of Phase II applications, they have been forced to reduce public inquiries, employment authorization extensions, advance parole inquiries, and all other services for these aliens in order to conserve resources for cases relating to *CSS* and *LULAC*. Offices have also been forced to reduce adjudicative services such as naturalization that affect aliens in general. This trend is accelerating as the influx of applications continues.

6. The financial burden of accepting legalization applications past the statutory deadline has also been very significant.

a. The legalization program was originally intended to be self-funding. INS was able to operate the program only because the application fees it generated were sufficient to cover its costs. These funds have been largely exhausted. Congress has not appropriated and is not expected to appropriate any funds for the continuing operation of legalization activities. Accordingly, the funds for dealing with *CSS* and *LULAC* applicants will have to come from reallocation of resources from other INS programs. This further impairs INS's ability to provide its normal services to aliens.

b. Under the *CSS* stay order, INS was required to accept applications without charging the normal application fee. Since about 80% of the applications filed have been filed under the *CSS* order, INS has been deprived of approximately $44,000,000 in revenue by operation of the stays.

c. The funds generated by the application fees were intended to cover the legalization program's operations prior to June 30, 1991. Because this litigation has extended the program into FY 1992, the FY 1992 budget was insufficient to meet the cost to continue the program. This will force the closure of all but two of the eight remaining legalization offices in April 1992, and the termination of many cost items such as personnel, data processing contracts, and leases (many of which are non-renewable).

7. Any requirement that INS process the legalization applications already received under the stay orders would create an even heavier burden on INS's resources and further impair its regular functions. If the Supreme Court ultimately decides the case in favor of the government, INS would be obliged to rescind adjustments previously granted, at further expense.

8. The plaintiffs' allegation that INS fails to question aliens it arrests concerning their membership in the plaintiff classes is incorrect. All field offices have been instructed to comply with this aspect of the *CSS* stay order, and this instruction is regularly reinforced. Apart from isolated instances in which a field officer errs, field officers are complying with this instruction.

9. The plaintiffs' allegation that INS denies temporary employment authorizations and stays of deportation without explanation to aliens who are clearly members of the plaintiff classes is incorrect. INS

makes every effort to comply with the provisions of the stays and to process applications as quickly as possible in a fair manner, as previously described in the September, 1990 Supplemental Declaration of Terrance M. O'Reilly filed in this Court. District offices have been instructed that when they deny an alien's claim to membership in the plaintiff classes, they should provide an explanation of the reason for the denial. Apart from isolated instances of error, district offices comply with this instruction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 1992.

/s/ James A. Puleo
JAMES A. PULEO,
Associate Commissioner,
Examinations

ATTACHMENT B1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

vs.

EDWIN MEESE, III, Attorney General of the United States, DEFENDANT

ORDER GRANTING PARTIAL STAY

[Filed June 24, 1988]

PROPOSED STAY ORDER

In an Order dated April 22, 1988, following extensive briefing and argument by all parties, this Court enjoined defendants from continuing to implement 8 C.F.R. section 245a.1(g). In Orders dated May 3, 1988, the court modified the definition of subclass 1 and granted plaintiffs' motion for summary judgment setting forth detailed findings explaining why 8 C.F.R. section 245a.1(g) is inconsistent with the relevant statutory provisions of the Immigration Reform and Control Act of 1986. The court thereafter ordered and received further briefing and argument on the question of "what remedies are available to members of subclass 1 and whether a stay of this court's orders should be granted." On June 10, 1988, the court issued an Order granting relief to subclass 1 members generally requiring the readjudication of legalization applications filed by subclass 1 members in a manner consistent with the court's May 3, 1988, summary judgment order, and permitting certain subclass 1 members to file legalization applications on or before November 30, 1988. The court denied a stay of this order, *inter alia*, because "[m]embers of the subclass continue to be deported and rendered subject to voluntary departure."

On June 17, 1988, plaintiffs filed a motion to modify this Court's June 10, 1988 Order, arguing that it fails to prevent the expulsion of apprehended subclass 1 members. On June 21, 1988, on the basis of the Supreme Court's decision in *INS v. Pangilinan*, OT 1987, No. 86-1992 (June 17, 1988), defendants filed a motion to vacate that portion of the Court's June 10, 1988 Order "which relates to extending the amnesty filing deadline . . . until November 30, 1987 [sic]." Defendants also sought a stay of the same portion of the Court's May 10, 1988 Order pending disposition of their motion to vacate.

On June 23, 1988, the Court held a telephonic hearing and Ordered the plaintiffs, within ten (10) days, to file any opposition they may have to defendants' motion to vacate, and defendants, within ten (10) days, to file any opposition they may have to plaintiffs' motion to modify the Court's June 10, 1988 Order.

In this Order I resolve defendants' request for a stay pending disposition of their motion to vacate a portion of the Court's May 10, 1988 Order. For the reasons explained below, a partial stay will be issued

pending disposition of defendants' motion to vacate or further Order of the Court.

Wtihout deciding the matter, it appears to the Court that it retains the equitable power to remedy the injury caused to subclass 1 members by defendants' unlawful promulgation and implementation of 8 C.F.R. section 245a.1(g). First, *Pangilinan* appears distinguishable on several grounds: (1) the Supreme Court nowhere concludes that the statute in question in *Pangilinan* was violated by the Attorney General; here, the Court has determined that the relevant IRCA statute was clearly violated by the Attorney General; (2) in *Pangilinan* the plaintiffs had several months to apply for naturalization, more than nationals of many other countries had; here, after this Court's April 22, 1988 Order, members of subclass 1 only had a few days to apply for legalization; (3) in *Pangilinan* the Court strengthened plaintiffs' argument in this case regarding application of the equitable tolling doctrine by reference to the application deadline as a "limitations period."

Second, as stated in *Pangilinan*, this Court retains the power to issue relief in the nature of "mandamus or [an] injunction" even assuming, *arguendo*, that it does not possess the equitable power to require INS to accept and adjudicate "legalization" applications until November 30, 1988. The Court's equitable power to remedy the injury suffered by subclass 1 members may be invoked to enjoin the expulsion of class members, and permit their employment. While not granting them the right to apply for "legalization" and all of the statutory benefits attendant that status, subclass 1 members would at least receive a part of the benefit they were denied

because of defendants' unlawful regulation and practice thereunder.

The Court is informed that the parties have attempted to reach agreement on the parameters of a stay order. Defendants have agreed to stay the expulsion of any apprehended person who affirmatively indicates membership in subclass 1 for the next ten (10) days. Plaintiffs however seek a stay Order which would protect from expulsion apprehended subclass 1 members not aware of their rights as class members (i.e. requiring an inquiry by the INS prior to expulsion). For all of the reasons heretofore expressed, and to preserve the *status quo* preventing the improper expulsion of subclass 1 members pending disposition of defendants' motion to vacate, IT IS HEREBY ORDERED that:

1. Paragraphs 3, 4 and 8 of this Court's June 10, 1988 Order are hereby stayed.

2. Pending disposition of defendants' motion to vacate, and plaintiffs' motion to modify this Court's June 10, 1988 Order, defendants, their agents, employees, and successors in office shall not remove under orders of deportation, voluntary departure, or otherwise, subclass 1 members, *except* defendants may remove subclass 1 members who (1) acknowledge, in writing, that they have been advised of the temporary stay of expulsion granted by this Order and still wish to depart the country; or (2) are otherwise subject to expulsion on grounds unrelated to this litigation. In the latter category defendants shall maintain records regarding the alternative basis for expulsion.

3. Defendants shall inquire of aliens apprehended and detained regarding their membership in subclass 1. Defendants need make no inquiry of aliens

apprehended by the INS entering or attempting to enter the United States without inspection or unlawfully through a port-of-entry.

4. In its discretion, the defendants may require subclass 1 members to submit evidence regarding their membership in the class and *prima facie* eligibility for legalization, as set forth in paragraphs 4 and 10 of this Court's May 10, 1988 Order. Subclass 1 members shall be provided a reasonable time of at least twenty (20) days to obtain such evidence as may be required by defendants prior to expulsion from the country.

5. The confidentiality requirements set forth in paragraph 6 of this Court's June 10, 1988, shall apply to any information obtained by defendants from subclass 1 members pursuant to this Order.

6. Defendants shall provide all apprehended or detained aliens identified as subclass 1 members with the names and phone numbers of plaintiffs' counsel Peter Schey and Ralph Abascal, and advise such class members that they may contact plaintiffs counsel for additional information regarding their rights as class members.

IT IS SO ORDERED.

DATED: June 28, 1988

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

Presented by:

/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Jacqueline Ligua, declare as follows:

1. I am employed in Los Angeles, California. My business address is National Center for Immigrants' Rights, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

2. I am over 18 years of age and am not a party to this action.

3. On this day I deposited in the United States Mail in an envelope bearing the requisite postage, express mail, addressed to:

Robert Kendall, Jr.
Office of Immigration Litigation
Civil Division
Department of Justice
601 D Street, Room 8212
Washington, D.C. 20530

and by first class mail to:

Glyndell Earl Williams
Special Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

true and correct copies of the following document(s):

1. Proposed Order Granting Partial Stay

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of June, 1988, in the city and county of Los Angeles, California.

/s/ Jacqueline G. Ligua

ATTACHMENT B2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127

DC# CVS-86-1343-LKK
Eastern California
(Sacramento)

CATHOLIC SOCIAL SERVICE, INC., ET AL.,
PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

vs.

RICHARD THORNBURGH, Attorney General of the
United States of America,
DEFENDANT/APPELLEE/CROSS-APPELLANT

ORDER

[Filed Aug. 22, 1988]

Before: BEEZER, Circuit Judges

The joint application for a temporary, interim stay pending disposition of the government's motion for a stay pending appeal is granted. The district court's order of June 10, 1988, is stayed pursuant to the terms and conditions of the district court's order of June 24, 1988, through and including September 1, 1988.

ATTACHMENT B3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127

DC# CVS-86-1343-LKK
Eastern California
(Sacramento)

CATHOLIC SOCIAL SERVICE, INC., ET AL.,
PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

vs.

RICHARD THORNBURGH, Attorney General of the
United States of America,
DEFENDANT/APPELLEE/CROSS-APPELLANT

ORDER

[Filed Aug. 30, 1988]

Before: BEEZER, Circuit Judges

The joint application for a temporary, interim stay pending disposition of the government's motion for a stay pending appeal is granted. The district court's order of June 10, 1988, is stayed pursuant to the terms and conditions of the district court's order of June 24, 1988, through and including September 6, 1988.

ATTACHMENT B4

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15127

DC# CV-86-1343-LKK
Eastern California

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLEES

vs.

RICHARD THORNBURGH, DEFENDANT-APPELLANT

ORDER

[Filed Sept. 6, 1988]

Before: BROWNING and LEAVY, Circuit Judges

This court's order filed on August 30, 1988 pursuant to the stipulated stay shall remain in effect until September 21, 1988. Within eight days of entry of this order, the Appellant shall file a memorandum with this court addressing the following issues: (1) Whether the Appellant shall release, without bond, apprehended subclass 1 members prior to final disposition of this appeal; (2) Whether temporary work permits should be granted to unapprehended and/or released subclass 1 members.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15127

DC# CV-86-1343-LKK
Eastern California

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLEES

vs.

RICHARD THORNBURGH, DEFENDANT-APPELLANT

ORDER

[Filed Sept. 20, 1988]

Before: BROWNING and LEAVY, Circuit Judges

Appellant's motion for a stay of the district court order pending appeal is denied in part and granted in part.

The stay as stipulated by the parties which was to expire September 21, 1988 is continued until this court issues a decision on the merits.

In addition, the court orders the following:

1. Appellant shall release without bond any subclass 1 member apprehended prior to final disposition of appellant's appeal to this Court and grant such alien temporary employment authorization. Release may be denied if the INS has reasonable grounds to believe the apprehended plaintiff or class member is deportable regardless of the outcome of appellant's appeal.

2. Appellant shall grant unapprehended plaintiffs and subclass 1 members, temporary employment authorization pending final disposition of appellant's appeal in this Court.

The case is released from the prebriefing conference program.

This appeal is hereby expedited. The Clerk shall calendar this case for a November hearing in San Francisco. The briefing schedule is as follows: Appellant's brief shall be filed on or before September 30, 1988. Appellees' brief shall be filed on or before October 12, 1988. Appellant may file a reply brief on or before October 19, 1988.

APPENDIX H

8 U.S.C.:

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order

An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application

Each application under this subsection shall contain such information as the Attorney Gen-

eral may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors

If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he—

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinon, and

(D) is registered or registering under the Military Selective Service Act [50 App. U.S.C. 451 et seq.], if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1522 note] shall be considered to have entered the United States and to be in an unlawful status in the United States.

(b) Subsequent adjustment to permanent residence and nature of temporary resident status

(1) Adjustment to permanent residence

The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

(A) Timely application after one year's residence

The alien must apply for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status.

(B) Continuous residence

(i) In general

The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.

(ii) Treatment of certain absences

An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A).

(C) Admissible as immigrant

The alien must establish that he—

(i) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, and

(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

(D) Basic citizenship skills

(i) In general

The alien must demonstrate that he either—

(I) meets the requirements of section 1423 of this title (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or

(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

(ii) Exception for elderly or developmentally disabled individuals

The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years of age or older or who is developmentally disabled.

(iii) Relation to naturalization examination

In accordance with regulations of the Attorney General, an alien who has demonstrated under clause (i)(I) that the alien meets the requirements of section 1423 of this title may be considered to have satisfied the requirements of that section for purposes of becoming naturalized as a citizen of the United States under subchapter III of this chapter.

(2) Termination of temporary residence

The Attorney General shall provide for termination of temporary resident status granted an alien under subsection (a) of this section—

(A) if it appears to the Attorney General that the alien was in fact not eligible for such status;

(B) if the alien commits an act that (i) makes the alien inadmissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, or (ii) is convicted of any felony or three or more misdemeanors committed in the United States; or

(C) at the end of the thirty-first month beginning after the date the alien is granted such status, unless the alien has filed an appplication

for adjustment of such status pursuant to paragraph (1) and such application has not been denied.

(3) Authorized travel and employment during temporary residence

During the period an alien is in lawful temporary resident status granted under subsection (a) of this section—

(A) Authorization of travel abroad

The Attorney General shall, in accordance with regulations, permit the alien to return to the United States after such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status under paragraph (1) and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

(B) Authorization of employment

The Attorney General shall grant the alien authorization to engage in employment in the United States and provide to that alien an "employment authorized" endorsement or other appropriate work permit.

(c) Applications for adjustment of status

(1) To whom may be made

The Attorney General shall provide that applications for adjustment of status under subsection (a) of this section may be filed—

(A) with the Attorney General, or

(B) with a qualified designated entity, but only if the applicant consents to the forwarding of the application to the Attorney General.

As used in this section, the term "qualified designated entity" means an organization or person designated under paragraph (2).

(2) Designations of qualified entities to receive applications

For purposes of assisting in the program of legalization provided under this section, the Attorney General—

(A) shall designate qualified voluntary organizations and other qualified State, local, and community organizations, and

(B) may designate such other persons as the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 1159 or 1255 of this title, Public Law 89-732 [8 U.S.C. 1255 note], or Public Law 95-145 [8 U.S.C. 1255 note].

(3) Treatment of applications by designated entities

Each qualified designated entity must agree to forward to the Attorney General applications filed with it in accordance with paragraph (1)(B) but not to forward to the Attorney General applications filed with it unless the applicant has consented to such forwarding. No such entity may make a determination required by this section to be made by the Attorney General.

(4) Limitations on access to information

Files and records of qualified designated entities relating to an alien's seeking assistance or information with resect to filing an application under this section are confidential and the Attorney General and the Service shall not have access to such files or records relating to an alien without the consent of the alien.

(5) Confidentiality of information

Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—

(A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application or for enforcement of paragraph (6) or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986,

(B) make any publication whereby the information furnished by any particular individual can be identified, or

(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications;

except that the Attorney General may provide, in the Attorney General's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13. Anyone who uses, publishes, or permits information to be examined in violation of this paragraph shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(6) Penalties for false statements in applications

Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Application fees

(A) Fee schedule

The Attorney General shall provide for a schedule of fees to be charged for the filing of applications for adjustment under subsection (a) or (b)(1) of this subsection.

(B) Use of fees

The Attorney General shall deposit payments received under this paragraph in a separate account and amounts in such account shall be available, without fiscal year limitation, to cover administrative and other expenses incurred in connection with the review of applications filed under this section.

(d) Waiver of numerical limitations and certain grounds for exclusion

(1) Numerical limitations do not apply

The numerical limitations of sections 1151 and 1152 of this title shall not apply to the adjustment of aliens to lawful permanent resident status under this section.

(2) Waiver of grounds for exclusion

In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B) of this section—

(A) Grounds of exclusion not applicable

The provisions of paragraphs (14), (20), (21), (25), and (32) of section 1182(a) of this title shall not apply.

(B) Waiver of other grounds

(i) In general

Except as provided in clause (ii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(ii) Grounds that may not be waived

The following provisions of section 1182(a) of this title may not be waived by the Attorney General under clause (i):

(I) Paragraphs (9) and (10) (relating to criminals).

(II) Paragraph (15) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence.

(III) Paragraph (23) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.

(IV) Paragraphs (27), (28), and (29) (relating to national security and members of certain organizations).

(V) Paragraph (33) (relating to those who assisted in the Nazi persecutions).

Subclause (II) (prohibiting the waiver of section 1182(a)(15) of this title) shall not apply to an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act [42 U.S.C. 1382c(a)(1)]).

(iii) Special rule for determination of public charge

An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

(C) Medical examination

The alien shall be required, at the alien's expense, to undergo such a medical examination (including a determination of immunization status) as is appropriate and conforms to generally accepted professional standards of medical practice.

(e) Temporary stay of deportation and work authorization for certain applicants

(1) Before application period

The Attorney General shall provide that in the case of an alien who is apprehended before the beginning of the application period described in subsection (a)(1)(A) of this section and who can establish a prima

facie case of eligibility to have his status adjusted under subsection (a)(1)(A) of this section and who can establish a prima facie case of eligibility to have his status adjusted under subsection (a) of this section (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first 30 days of the application to complete the filing of an application for adjustment, the alien—

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(2) During application period

The Attorney General shall provide that in the case of an alien who presents a prima facie application for adjustment of status under subsection (a) of this section during the application period, and until a final determination on the application has been made in accordance with this section, the alien—

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determination contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the

findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

(g) Implementation of section

(1) Regulations

The Attorney General, after consultation with the Committees of the Judiciary of the House of Representatives and of the Senate, shall prescribe—

(A) regulations establishing a definition of the term "resided continuously", as used in this section, and the evidence needed to establish that an alien has resided continuously in the United States for purposes of this section, and

(B) such other regulations as may be necessary to carry out this section.

(2) Considerations

In prescribing regulations described in paragraph (1)(A)—

(A) Periods of continuous residence

The Attorney General shall specify individual periods, and aggregate periods, of absence from the United States which will be considered to break a period of continuous residence in the United States and shall take into account absences due merely to brief and casual trips abroad.

(B) Absences caused by deportation or advanced parole

The Attorney General shall provide that—

(i) an alien shall not be considered to have resided continuously in the United

States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation, and

(ii) any period of time during which an alien is outside the United States pursuant to the advance parole procedures of the Service shall not be considered as part of the period of time during which an alien is outside the United States for purposes of this section.

(C) Waivers of certain absences

The Attorney General may provide for a waiver, in the discretion of the Attorney General, of the periods specified under subparagraph (A) in the case of an absence from the United States due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

(D) Use of certain documentation

The Attorney General shall require that—

(i) continuous residence and physical presence in the United States must be established through documents, together with independent corroboration of the information contained in such documents, and

(ii) the documents provided under clause (i) be employment-related if employment-related documents with respect to the alien are available to the applicant.

(3) Interim final regulations

Regulations prescribed under this section may be prescribed to take effect on an interim final basis if the Attorney General determines that this is necessary in order to implement this section in a timely manner.

(h) Temporary disqualification of newly legalized aliens from receiving certain public welfare assistance

(1) In general

During the five-year period beginning on the date an alien was granted lawful temporary resident status under subsection (a) of this section, and notwithstanding any other provision of law—

(A) except as provided in paragraphs (2) and (3), the alien is not eligible for—

(i) any program of financial assistance furnished under Federal law (whether through grant, loan, guarantees, or otherwise) on the basis of financial need, as such programs are identified by the Attorney General in consultation with other appropriate heads of the various departments and agencies of Government (but in any event including the program of aid to families with dependent children under part A of title IV of the Social Security Act [42 U.S.C. 601 et seq.]),

(ii) medical assistance under a State plan approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], and

(iii) assistance under the Food Stamp Act of 1977 [7 U.S.C. 2011 et seq.]; and

(B) a State or political subdivision therein may, to the extent consistent with subparagraph (A) and paragraphs (2) and (3), provide that the alien is not eligible for the programs of financial assistance or for medical assistance described in subparagraph (A)(ii) furnished under the law of that State or political subdivision.

Unless otherwise specifically provided by this section or other law, an alien in temporary lawful residence status granted under subsection (a) of this section shall not be considered (for purposes of any law of a State or political subdivision providing for a program of financial assistance) to be permanently residing in the United States under color of law.

(2) Exceptions

Paragraph (1) shall not apply—

(A) to a Cuban and Haitian entrant (as defined in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1255 note], as in effect on April 1, 1983), or

(B) in the case of assistance (other than aid to families with dependent children) which is furnished to an alien who is an aged, blind, or disabled individual (as defined in section 1614 (a)(1) of the Social Security Act [42 U.S.C. 1382c(a)(1)]).

(3) Restricted medicaid benefits

(A) Clarification of entitlement

Subject to the restrictions under subparagraph (B), for the purpose of providing aliens with eligibility to receive medical assistance—

(i) paragraph (1) shall not apply,

(ii) aliens who would be eligible for medical assistance but for the provisions of paragraph (1) shall be deemed, for purposes of title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], to be so eligible, and

(iii) aliens lawfully admitted for temporary residence under this section, such status not having changed, shall be considered to be permanently residing in the United States under color of law.

(B) Restriction of benefits

(i) Limitation to emergency services and services for pregnant women

Notwithstanding any provision of title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] (including subparagraphs (B) and (C) of section 1902(a)(10) of such Act [42 U.S.C. 1396a(a)(10)(B), (C)]), aliens who, but for subparagraph (A), would be ineligible for medical assistance under paragraph (1), are only eligible for such assistance with respect to—

(I) emergency services (as defined for purposes of section 1916(a)(2)(D) of the Social Security Act [42 U.S.C. 1396*o*(a)(2)(D)]), and

(II) services described in section 1916(a)(2)(B) of such Act (relating to service for pregnant women).

(ii) No restriction for exempt aliens and children

The restrictions of clause (i) shall not apply to aliens who are described in paragraph (2) or who are under 18 years of age.

(C) Definition of medical assistance

In this paragraph, the term "medical assistance" refers to medical assistance under a State plan approxed under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].

(4) Treatment of certain programs

Assistance furnished under any of the following provisions of law shall not be construed to be financial assistance described in paragraph (1) (A) (i):

(A) The National School Lunch Act [42 U.S.C. 1751 et seq.].

(B) The Child Nutrition Act of 1966 [42 U.S.C. 1771 et seq.].

(C) The Vocational Education Act of 1963 [20 U.S.C. 2301 et seq.].

(D) Chapter 1 of the Education Consolidation and Improvement Act of 1981 [20 U.S.C. 3801 et seq.].

(E) The Headstart-Follow Through Act [42 U.S.C. 2921 et seq.].

(F) The Job Training Partnership Act [29 U.S.C. 1501 et seq.].

(G) Title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 42 U.S.C. 2751 et seq.].

(H) The Public Health Service Act [42 U.S.C. 201 et seq.].

(I) Titles V, XVI, and XX [42 U.S.C. 701 et seq., 1381 et seq., 1397 et seq.], and parts B, D, and E of title IV [42 U.S.C. 620 et seq., 651 et seq., 670 et seq.], of the Social Security Act (and titles I, X, XIV, and XVI of such Act [42 U.S.C.

301 et seq., 1201 et seq., 1351 et seq., 1381 et seq.] as in effect without regard to the amendment made by section 301 of the Social Security Amendments of 1972).

(5) Adjustment not affecting Fascell-Stone benefits

For the purpose of section 501 of the Refugee Education Assistance Act of 1980 (Public Law 96-122)[a] [8 U.S.C. 1255 note], assistance shall be continued under such section with respect to an alien without regard to the alien's adjustment of status under this section.

(i) Dissemination of information on legalization program

Beginning not later than the date designated by the Attorney General under subsection (a) (1) (A) of this section, the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits.

5 U.S.C.:

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent

jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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No. 91-1826

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner

v.

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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents in Catholic Social Services, Inc. *et al.* and League of United Latin American Citizens *et al.* (hereafter, "CSS" and "LULAC") respectfully urge that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

In addition to those *CSS* opinions cited by INS in its Petition, another Court of Appeals opinion is at 820 F.2d 289 (9th Cir. 1987) and another related District Court opinion is at 664 F. Supp. 1378 (E.D. Cal. 1987).

STATEMENT OF THE CASE

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), P.L. 99-603, 100 Stat. 3359, the cornerstone of which was the largest legalization program in U.S. history, perhaps in world history. In an extraordinary act of grace, the American people reached out to that large "shadow population," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. ——, 111 S.Ct. 888, 891 (1991), undocumented aliens who had been living underground in our midst for many years. Congress further recognized that through legalization, limited INS enforcement resources could be shifted and concentrated more effectively on the U.S. borders.

Eligible aliens were those who were unlawfully resident but who had put down roots (i.e., they could show "continuous residence") in the U.S. since prior to January 1, 1982 (8 U.S.C. § 1255a(a)(2)(A)), and were also physically present in the U.S. since November 6, 1986, IRCA's effective date. § 1255a(a)(3)(A). (Further statutory citations are to Title 8, unless specified otherwise.)[1] Critical to these cases are the exceptions that allowed brief absences after January 1, 1982, as well as after enactment of IRCA.

Both *CSS* and *LULAC* involved successful class action challenges to regulations which had disqualified large numbers of aliens who traveled briefly outside of the U.S. In neither case did INS appeal from the merits of the decisions. The District Courts in both cases briefly tolled the termination of the application period for eligible aliens who, because of travel outside the U.S., had

[1] A comparable legalization program, but with shorter durational residence requirements, was established for Special Agricultural Workers, or "SAWS"; the key SAW eligibility factor is employment in farm labor for 90 days between May 1, 1985 and May 1, 1986. § 1160(a)(1)(B)(ii); 8 C.F.R. § 210.3(a). However, the judicial review provisions in both are virtually identical. *Cf.* § 1160(e) *with* § 1255a(f). See also, *McNary, supra*, 111 S.Ct. at 890-91.

their applications unlawfully rejected or who were discouraged from applying because of such travel. While INS did not appeal from the merits of either decision, it did appeal these relief orders. Pending appellate review, class members clearly required protection from deportation and forced unemployment. In *LULAC*, it was provided by stipulation, while in *CSS*, by a Ninth Circuit order.

Over 300,000 putative class members have so far come forward, at least half of which INS has agreed are "prima facie" eligible for legalization; so, they have temporary work/stay documents. Reversal by this Court will return them to the unregulated "shadow underground." Under the present protective orders, identifying information is confidential so deportation will not begin unless they are independently apprehended. This outcome will completely thwart the dual Congressional objectives intended by amnesty and employer sanctions.

IRCA's purposes are both ameliorative and instrumental. As Congress explained, many undocumented aliens had put down deep roots in the U.S., many had "strong family ties" with "U.S. citizens and lawful residents" and they had long been "contribut[ing] . . . their talents, labor and tax dollars" to the nation. H.R. Rep. No. 99-682, Pt. I, 99th Cong., 2d Sess., Oct. 14, 1986, 49; (a substantial portion of this page of the Committee Report is quoted in *McNary*, 891 n.4). But, "because of their undocumented status, these people live[d] in fear, afraid to seek help when their rights are violated . . . by criminals, employers or landlords or when they become ill." H.R. Rep. No. 99-682, *supra*, 49. Legalization, "would allow [such] aliens to contribute openly to society and it would help to prevent the exploitation of this vulnerable population in the work place." *Id.*

Instrumentally, Congress' plan was that the legalization of the "shadow population," combined with the first-

time-ever prohibition in § 1324a(a) on employing aliens without express INS permission to work (commonly called "employer sanctions"), "would enable INS to target its enforcement efforts on new flows of undocumented aliens. . . ." *Id.*

In interpreting IRCA's text, it is important to recognize that any doubts should be resolved in favor of an interpretation maximizing the number of eligible aliens whose status is thereby regularized. Only such an interpretation would be consistent with the Congressional directive that the Act "be implemented in a liberal and generous fashion" because "[s]uch implementation is necessary to ensure the true resolution of the problem and to ensure that the program will be a one-time-only program." *Id.* 72.[2]

[2] Several IRCA provisions confirm that Congress sought to maximize the number of legalized aliens. First, Congress realized that many aliens would be loathe to approach INS, the most feared officialdom during the "shadows" years, to claim legalization. Congress knew that such fear had resulted in low turn-out rates in the legalization programs of other nations. H.R. Rep. No. 99-682, *supra*, 73. So, it authorized INS to contract with, and fund, churches, social service agencies, etc. entities that aliens would believe had a greater fidelity to their interests. These groups would preliminarily screen the eligibility of aliens who thought they might be legalizable. *Ibid.*; § 1255a(c)(1)-(3). These recruiters were called "Qualified Designated Entities", or QDEs. See also IRCA, P.L. 99-603, § 111(c).

Second, Congress barred INS from accessing QDE documents. § 1255a(c)(3), "to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rep. No. 99-682, *supra*, 73.

Third, Congress mandated "an extensive education and outreach program," *id.* 73, whereby, before the application period began, INS would "broadly disseminate information respecting . . . the requirements to obtain" legalization. § 1255a(i).

Fourth, Congress allowed for a *full* 12-month application period so the most timorous could "chew and stew", i.e., learn about the requirements for legalization, overcome their fears of contacting officialdom, and then act. Earlier legalization programs in other countries suffered from too short an application period. Meissner, Papademetriou, & North, *Legalization of Undocumented Aliens: Lessons From Other Countries*, 1-2 (1986) (Argentina, six months, *id.* 9, Venezuela, four months, *id.* 11, Canada, 60 days, *id.* 13.).

It was this very INS outreach program, and the mandated false information given out by INS and QDEs, that were the means of *erroneously* informing aliens of the illegal policies that were later invalidated in both *CSS* and *LULAC*, a disinformation campaign that thereby rejected class members by planting sterile seeds.

Keeping this Congressional imperative in mind, INS suggests a remarkable interpretive paradox: the only judicial review available to the class members concededly eligible is through § 1255a(f), which however is *not* available because they did not file applications within the designated one-year period. Even though the nature and extent of how INS mulcted them did not completely become known until just eight days (*CSS*) before the application period closed, or after (*LULAC*), INS' response is, "Well, that's your fault—next time you deal with us, just don't believe anything we say."

When Congress drafted IRCA, it is fair to conclude that it assumed INS would obey the statute and draft consistent regulations. In these cases, INS by its own admission violated the statute (reflected by its failure to appeal the merits of these cases), preventing thousands of otherwise eligible aliens from seeking legalization despite Congress' clear intention that they be legalized. This Court now faces the same question that was before it in *McNary*: what access to judicial review did Congress intend these aliens to have? Class-wide resolution at an early stage that permits work authorization and stays of deportation, or futile administrative exhaustion and hundreds of thousands of individual cases clogging the administrative system and the courts of appeals for years?

1. **The CSS Case.** Because of the need for "an extensive education and outreach program prior to the application period," H.R. Rep. No. 99-682, *supra*, 73, Congress allowed for a six-month hiatus before applications would be accepted. However, to insure that no eligible alien would be ousted from the U.S. in the interim, it entitled all apprehended aliens to a stay of deportation and a work permit, even before they had filed an application, if they could "establish a prima facie case of eligibility" for legalization. § 1255a(e)(1); 8 C.F.R. § 245a.1(n). A similar entitlement was provided for after the application period began. § 1255a(e)(2); *McNary*, *supra*, at 892. Immediately upon IRCA's enactment, legalizable aliens had a crucial need for a stay and a work permit because the other key part of IRCA, the prohibition on employment of aliens without express INS permission to work, became effective upon enactment of the measure. § 1324a(a); *McNary*, 891 n.2.

Initially, INS refused to issue stay/work permits. For this reason, the *CSS* plaintiffs filed suit to compel such implementation. Two hours before the District Court's TRO hearing, INS implemented the statute by means of telegraphic instructions to its offices. However, in the very same telegram, INS adopted a policy that declared that no post-November 6, 1986 absence could be "brief, casual and innocent" unless the otherwise-eligible alien had obtained prior INS permission to travel.[3]

[3] The basic dispute over the meaning of "brief, casual, and innocent absences" long preceded *CSS*. Its history reveals that the invalidated regulation was more than a simple inadvertent, unintentional, or negligent error. The doctrine had evolved as an interpretation of the suspension of deportation authority in § 1254(a)(1) based on *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). See *CSS v. Meese*, 685 F. Supp. 1149, 1157-59 (E.D. Cal. 1988). That interpretation was squarely rejected by this Court in *INS v. Phinpathva*, 464 U.S. 183 (1984), but then just as squarely reinstated by IRCA, § 315(b).

When IRCA was still aborning in the House Judiciary Committee, the Attorney General vigorously opposed § 315(b), H.R. Rep. 99-682, *supra*, 124, *and* urged in its stead authorization to implement the very same policy invalidated by *CSS*. *Id.* 116. Finally, still trying to win the lost battle, the President's IRCA signing statement conditioned his assent on an understanding that § 1255a(a)(3)(B) *did* authorize what the Attorney General had sought all along. During the 1986-87 *CSS* appeal, the Attorney General vigorously tried to have the President's statement deemed controlling. See generally, Garber and Wimmer, "Presidential Signing Statements as Interpretation of Legislative Intent: An Executive Aggrandizement of Power," 24 HARV. J. ON LEGIS. 363 (1987).

Such persons were turned away at the INS threshold because they were deemed "statutorily ineligible" even to *apply for* legalization because of such unauthorized travel, even if otherwise "brief, casual, and innocent". (Such aliens "will be considered *ineligible to apply for legalization.*" INS Legalization Wire No. 14, p. 4. (emph. add.).) Until May, 1987, when IRCA's first regulations were published in the Federal Register, the *only* way an alien could know of the policy was by reading the November 14, 1986 telegram.[4] Under this policy, INS immediately began to oust aliens otherwise eligible for legalization.

CSS immediately amended its complaint to challenge the prior travel permission requirement. On May 3, 1988, partial summary judgment was granted invalidating the regulation and providing that "brief, casual, and inno-

[4] The District Court in *CSS* has not yet ruled upon plaintiffs' claims that this telegraphic means of promulgating such crucial policies violated 5 U.S.C. §§ 552(a)(1)(D) and 553(b)-(c); see *Morton v. Ruiz*, 415 U.S. 199 (1974); *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir. 1977); *Aiken v. Obledo*, 442 F. Supp. 628, 647-55 (E.D. Cal. 1977). It is administrative lawmaking like this that prompted Congress to enact the publication requirements of the Freedom of Information Act and the Federal Register Act. 1 Davis, ADMIN. LAW TREATISE § 6.09, at pp. 392-94 (1st ed. 1958).

cent" absences did not require prior INS approval. 685 F. Supp. 1149. This ruling was not appealed. In June and August, remedial orders were entered. App. 22a-49a; see further pp. 10-13 below.

2. **The LULAC Case.** *LULAC* involved another illegal policy, a conceptual variant of the policy challenged in *CSS*. This regulation interpreted § 1255a(a)(2) to provide that an alien's requisite *illegal* "continuous residence" since January 1, 1982 would be deemed "discontinuous" if, after a brief absence, the alien had reentered the U.S. by means of fraudulent INS documentation. The rationale was that the use of facially valid documentation rendered the alien's subsequent residence valid, even though the alien, if later apprehended, could never thereby avoid swift ouster. In July, 1987, LULAC sued in the Central District of California challenging the regulation. On July 15, 1988, the court ruled that reentries into the U.S. after brief absences improperly using INS documentation did not sever continuous illegal residence. App. 50a-60a. As in *CSS*, INS did not appeal from this merits ruling.

3. **The Jurisdictional Issue.** The district courts in these two cases assumed jurisdiction under 28 U.S.C. § 1331 (federal question) and 8 U.S.C. § 1329 (jurisdiction over "all causes . . . arising under any of the provisions of" the subchapter of the Immigration and Nationality Act ("INA") in which IRCA is located.[5]

IRCA provides for a very limited, specialized scheme for judicial review of an INS "determination respecting an application for adjustment of status. . . ." § 1255a(f)(1). Such a "determination" is reviewable only in the

[5] INS has blown hot and cold in these two cases. Jurisdiction was not raised during either District Court proceeding, nor was it raised by INS in the Court of Appeals. Just preceding the *CSS* oral argument, the Court *sua sponte* sought briefing on the issue; the Government then conceded jurisdiction following the decision in *McNary*. Then, following the recent rejection of *McNary*'s rationale, *Ayuda v. INS*, 948 F.2d 742 (D.C. Cir. 1991), the claim was reborn.

Court of Appeals and *only* if, after a "denial" of an application, § 1255a(f)(3)(A), (and the concomitant rescission of the stay of deportation/work permit), the alien is subsequently apprehended and ordered deported by INS.

Neither the *CSS* nor the *LULAC* plaintiffs sought a determination on any alien's discrete legalization application; none had received an INS "denial." Rather, they challenged, on constitutional and statutory grounds, the two pertinent eligibility regulations that the INS had instructed all of its staff, QDEs, and the Legalization Appeals Unit ("LAU") to follow in adjudicating individual applications.

Significantly, the LAU has no power to invalidate INS regulations on statutory or constitutional grounds. See below at p. 17 n.15. Exhaustion of an administrative appeal in such a case therefore is clearly futile. It must not be forgotten that an alien raising questions of the legality of a particular regulation in that process could do so only long *after* rescission of a stay of deportation and a work permit, a very daunting prospect.

4. **This Court's Decision in McNary.** After oral argument, the Ninth Circuit delayed its decision because circuit conflict over jurisdiction arose between *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir., 1989), a class action challenging a § 1255a regulation (as in these two cases), and *Haitian Refugee Center, Inc. v. McNary*, 872 F.2d 1555 (11th Cir. 1989), a class action challenging a § 1160 regulation and other procedures under the Special Agricultural Workers ("SAWs") half of the legalization program. App. 7a. Contrary to INS' current position, the Solicitor General then told this Court it should interpret the jurisdictional provisions identically. *Ayuda*, Govt. Opp. to Cert. at 16; *McNary*, Govt. Pet. for Cert. at 28.

This Court spurned INS' jurisdictional arguments, 7-2, in *McNary*, 111 S.Ct. 888, and remanded *Ayuda* for re-

consideration in light of *McNary*, 111 S.Ct. 1068.[6] Fundamentally, *McNary* broke no new ground, but merely confirmed a longer line of other cases that had ruled similarly under § 1329 and 28 U.S.C. § 1331.

5. **Relief In CSS.** On April 22, 1988, just eight working days before the § 1255a application period closed, the District Court in *CSS* enjoined enforcement of the "prior travel permission" regulation. 685 F.Supp. at 1160. As to the smaller subclass of aliens who had actually been fortunate enough to submit applications despite INS' "rejections" policy (those in the "pipeline"), INS was ordered to readjudicate their applications without reference to the invalid regulation. App. 24a-25a. INS has not appealed from this part of the order, effectively conceding the regulation's invalidity.

Another subclass consisted of a very large number of aliens that INS had improperly thwarted or discouraged from even filing applications based on the illegal "advance travel permission" regulation. Indeed, this effect was compelled by INS' own required procedures. For example, reflecting the earlier telegraphic staff instruction (see p. 7 above), the INS Legalization Manual, binding on both its own staff and QDEs, expressly stated that "[i]f there are major deficiencies in the application package *or if the applicant . . . is statutorily ineligible, the application will be rejected.*" *Id.* § IV-6. It made clear that an application is "rejected" when it is turned down *without* processing and without acceptance of the filing fee. *Id.* §§ IV-3, IV-6, IV-7 (describing the procedure "[i]f an applicant who has been rejected by the [INS or

[6] On remand, the D.C. Circuit, 2-1, rejected this Court's analytical framework based on a rationale that was not offered by either INS or the *McNary* dissenters, which did not reflect Congressional intent, the language, nor the logic, of *McNary*, and restated its earlier conclusion that the specialized review provision of § 1255a(f) precluded other jurisdictional bases. *Ayuda, supra* n.5.

its agents] insists on filing," or if an application received from a QDE is insufficient).[7]

Moreover, Article IV, ¶ 3.2 of the Cooperative Agreement between each QDE and INS required QDEs to comply with "all INS regulations relating to the legalization program." As a result, logic as well as the record evidence in these cases demonstrates that many eligible aliens *were* told by INS, or by QDEs acting as INS' agents, that they would not be permitted even to file an application because they did not satisfy INS' legalization eligibility standards invalidated in these cases.[8]

[7] Deposition testimony in these and other IRCA class actions has confirmed this practice, common in mass governmental benefit programs. *See, e.g., Schweiker v. Hansen*, 450 U.S. 785, 786-87 (1981); *Murillo v. Mathews*, 588 F.2d 759, 760 (9th Cir. 1978). It is often called an "informal denial", informal since no appeal rights accrue because the applicant fails to file an application due to the agency's advice that to do so would be futile. In INS parlance, it is often called "front desking" since the screening process occurs at the front desk of an INS office.

Strictly speaking, a "front desked" alien might have nevertheless been able to force acceptance of an application but the practical realities would seem to make such cases rare. First, a hefty filing fee, upwards of $420, was extracted by INS; second, a physical exam, which might cost even more, was required; attorneys' fees could even be greater; then, there was the time and energy required to pursue what seemed to nearly anyone to be the essence of futility, trudging on through the administrative appeals process, volunteering for deportation, securing counsel to petition the Court of Appeals to review the deportation order, and finally obtaining judicial review of the legalization denial, etc. See further below, pp. 17-19.

[8] INS' suggestion that the challenges to the regulations are not yet ripe, see discussion of *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 3177 (1990), Pet., pp. 11, 13, nn. 13, 16, is surely answerable by its refusal to accept valid applications. It is the crucial denial of a temporary work permit and stay of deportation via "front desking" that is the "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, at 3190.

Because the offending regulation was not invalidated until just eight days before INS stopped accepting applications, the *CSS* District Court granted the only effective relief for the subclass of thwarted or discouraged aliens at its disposal: it tolled the closing off of applications until November 30, 1987, a period just short of seven months. (The Court provided, alternatively, that if the order were appealed, then stayed, but later affirmed, the tolling period would extend for 180 days following the date affirmance became final.) App. 25a.[9]

6. **Relief In LULAC.** Relief in *LULAC* followed essentially the same pattern as that in *CSS*. It was not

[9] In two instances in its Petition, INS seriously misstates the nature and effect of the district court orders. First it states, at p. 7 n.7, that "the order effectively bars INS from deporting any individual who submits to INS an application contending he [sic] is entitled to relief. . . ." INS has advised class counsel that approximately ½ of the 300,000 aliens who have claimed membership in either the *CSS* or the *LULAC* classes are *not* class members. Accordingly, INS has *not* granted them stays of deportation or work permits, subjecting them, obviously, to deportation. Because they are not class members, "if the ruling stands, INS will" not "be compelled to examine on an individual basis more than 300,000 applications," Pet. 21.

Second, it is true that the number of claims of class membership has grown larger than it would have been had INS not appealed from the district courts' orders, because the judicial process has lumbered along despite all attempts for expedition. INS seems to believe that it is the fault of *class members* that now, "in 1992, more than *five* years after the November 6, 1986, INS is still receiving applications pursuant to the Ninth Circuit's order." Pet. 17-18. INS made both beds in which it lies; the first in the adoption of the substantive policy which it had very good reason to believe from the outset would not be tolerated by the courts (see pp. 6-7 n.3 above); the second in initiating the appellate process; it would be a supreme irony, tantamount to the famed observation of Anatole France regarding the equality of laws barring sleeping under bridges and the theft of bread, to rely on these factors to deny relief to these class members and thereby place them on the block for ouster from our land. They came because of what our form of democracy means throughout the world—the lesson they learn should not be that ours is a mean form of democracy.

until July 15, 1988, after the application period had closed, that the District Court enjoined enforcement of the regulation at issue. As in *CSS*, INS was ordered to reevaluate the applications of the subclass of aliens who were "in the pipeline." In addition, the Court tolled the application period deadline for the subclass of "front desked," discouraged and thwarted aliens for the same period as in *CSS*, i.e., until November 30, 1987. App. 50a-60a.

7. **INS Has Appealed Only From the Relief Tolling the Application Period For the Rejected and Discouraged Aliens.** In both cases, INS has readily acquiesced in the relief ordered for those "in the pipeline." Perversely, it is only the relief for those who it treated most egregiously that INS has challenged in both the Court of Appeals and here.

REASONS FOR DENYING THE WRIT

I. JURISDICTION.

1. **Certworthiness.** INS' petition requires nothing more than a straightforward application of last year's *McNary* opinion, a 7-2 decision. To be charitable, INS is trying to thread a mighty thin needle to escape from *McNary*. Moreover, it should be apparent that, in contrast to many issues that come before this Court, this one will have little future impact. This follows from the fact that IRCA's legalization programs have effectively been over for nearly four years. App. 84a. No camel's noses will slip under the tent in the form of new class actions. Therefore, this case does not even fit the rare situation where this Court wishes to do a quick *volte face* because such a desire is nearly always in the context of a pragmatic, crying future need for different law.[10]

[10] It is noteworthy that this Court did not accept the Government's suggestion in *INS v. NCIR*, 112 S. Ct. 551 (1991), Pet. for Cert. 1, to revisit *McNary's* resolution of the scope of federal question jurisdiction in INA cases.

Putting aside the absence of a common sense, pragmatic need to revisit *McNary* while its ink is still drying, INS' discovery of a "heart of the case" test lurking in the penumbras of *McNary* is unsupported in either the opinion's logic or its text, the text or legislative history of the statute, or even the analysis of the two *McNary* dissenters.

2. **The McNary Decision.** *McNary* broadly held that Congress had not intended to divest the district courts of their traditional jurisdiction under § 1329 and 28 U.S.C. § 1331 to hear *all* legal challenges to INS' policies and regulations (without reference to the disposition of any particular individual's legalization application), and that Congress had intended IRCA's specialized review procedure to apply *only* to individual challenges to those policies applied on a case-by-case basis:

> [W]e hold that [IRCA's specialized review provision] applies *only* to review of denials of individual . . . applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired . . . 111 S. Ct. at 897 (emph. added.).[11]

McNary began its analysis with the plain language of § 1160(e)(1)-(3), the SAW analogue of § 1255a(f)(1)-(3), which created a specialized judicial review procedure applicable, by its terms, only to claims challenging "a determination respecting an application for adjustment of status." *Id.* 896. (The Solicitor General had

[11] *McNary* is nothing more than an application of this Court's broader doctrine, rooted in the practical need for economizing scarce judicial resources, which distinguishes between broad constitutional or statutory challenges to an agency's policies and narrow challenges to an agency's application of unchallenged policy to the facts of an individual case. *See, e.g., International Union, United Auto. Wkrs., etc. v. Brock*, 477 U.S. 274, 291 (1986) ("*UAW v. Brock*"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986).

argued that the two provisions were identical; see p. 9 above.) Adopting the lower courts' construction of this language. *McNary* stated:

> The critical words in [§ 1160(e)], however, describe the provision as referring only to review "of *a determination* respecting *an application*" . . . (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. *Id.*[12]

McNary therefore held that Congress intended that § 1255a(f)(3) review applies only to fact-finding or law-applying challenges to the "merits of a denial of a particular application" (*id.* 897), "rather than . . . general collateral challenges to unconstitutional practices and polices used by the agency in processing applications" (*id.* 896), or "generic constitutional and statutory claims." *Id.* 899. At no point did the Court draw a distinction between "a collateral challenge to INS' procedures, rather than the substantive standards under which INS evaluated applications. . . ." Pet. 12.

3. **The Ayuda II Decision.** The *Ayuda II* majority ignored both the plain text of § 1255a(f) and this Court's common sense prior construction, making no attempt to explain how the phrase "a determination respecting an application" by its terms supported a distinction between collateral and direct legal challenges. Instead, the majority simply concluded that this Court did not mean what it had plainly said. See *Ayuda II*, at 748-49 & n.5.

McNary concluded that INS could find no solace in the text of § 1160(e)(3)(B)/1255a(f)(3)(B) limiting court

[12] See also *Ayuda I*, 880 F.2d at 1349 (Wald, C.J., dissenting): "To the ordinary reader, . . . this phrase . . . appears to cover only the determinations that are made with respect to each application. . . ."); *Morales v. Yeutter*, 952 F.2d 954, 956-57 (7th Cir. 1991) (Posner, J.): "[I]t is apparent from the language of the provision and . . . the character of immigration proceedings, and . . . [*McNary*] held . . . that the provision is limited to cases brought by [an alien] whose application . . . is turned down.")

of appeals' review "solely [to] the administrative record" and stating that "findings ... shall be conclusive [subject to] abuse of discretion" or when directly contradicted by "clear and convincing facts" because generic statutory and constitutional challenges do not fit within that model of review; therefore, such challenges were not within Congress' contemplation of the scope of IRCA's narrow judicial review provision. *Id.* 896.

Ayuda II skirted deference to this conclusion. While conceding the premise, the *Ayuda II* majority claimed that Congress must have intended the § 1255a(f) "abuse of discretion" standard to be implicitly transformed into a "*de novo* standard"—despite total textual silence—whenever a plaintiff brought a legal rather than a factual claim. 948 F.2d at 748. But *McNary* expressly held otherwise, concluding that if Congress had intended § 1255a(f) to apply to generic legal challenges, it would have explicitly adopted a *de novo* standard of review. *McNary* 897.

4. **Meaningful Judicial Review.** INS claims that here, in contrast to *McNary*, there is an opportunity for "meaningful judicial review" (Pet. 12-13) thus overcoming the traditional presumption favoring district court jurisdiction. Pet. 11-12. The thrust of that argument is that a challenge to a regulation does not suffer by limitation to the administrative record, which ignores the clear INS policy that administrative reviewers are powerless to address generic challenges. INS also ignores *McNary*'s key conclusion: limiting judicial review of legalization denials to cases where aliens had to "voluntarily surrender themselves for deportation i[s] ... [q]uite obviously ... tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* 898.[13]

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[13] INS concludes this argument with the suggestion that deportation proceedings would naturally follow denial of an application. ("In short, respondents readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings

McNary held that limiting generic challenges to § 1255a (f) review would create enormous practical hurdles. Nothing in INS' Petition offers any reason to abandon that conclusion. To do so now requires a conclusion that Congress intended individual legalization claimants, as a condition to obtaining judicial review of a statutory or constitutional challenge to an INS legalization policy:

1. to make a necessarily futile (and costly) application for legalization; [14]

2. to appeal the resulting denial to a LAU that has no authority to consider the merits (and thus rule in the alien's favor) on a statutory or constitutional claim; [15]

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that *would have been brought against them* if they had been denied relief [by the LAU]." Pet. 13-14 (emph. add.).

But there is no inexorable link between denial of legalization and deportation. Indeed, those who have resided in the "shadows" for 5, 10, 15, 20 years, have obviously shown keen evasion skills. Moreover, Congress created a Chinese Wall between INS legalization and enforcement staff, threatening the latter with severe criminal sanctions, if they used information collected in the legalization process. § 1255a(c)(5).

[14] The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. § 103.7(b). See further, p. 14 n.11, above.

[15] *McNary* 896-97: "Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in [the specialized review provision] is not contemplated by the language of that provision"); *see also Ayuda I*, 880 F.2d at 1332 nn.6 & 7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"). Yet, inexplicably, INS persists in claiming that allowing district court class action challenges to regulations "bypasses adjudication by the expert administrative agency. . . ." (Pet. 11) (thereby "prevent[ing] the Attorney general's designated authority [the LAU] . . . from considering these central statutory issues." Pet. 13.

But, the LAU has no authority to reject a regulatory interpretation of a statute. *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) ("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges,

3. to waive the statutory right to confidentiality by voluntarily surrendering to the INS,[16] or wait however long to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate—thus precluding judicial review altogether);[17]

4. to be issued an order of deportation and then file a futile appeal to INS' Board of Immigration Appeals;[18]

5. to file a petition for review in a court of appeals that has not had the benefit of prior district court consideration of these statutory or constitutional issues;[19] and

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and neither has any authority to consider challenges to regulations . . . any more than there is authority to consider constitutional challenges to the laws we administer.") See also, 8 C.F.R. § 103.3 (a)(3)(iii); *cf. Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions are obviously unsuited to resolution in administrative hearing procedures, and, therefore, access to the courts is essential to the decision of such questions.").

[16] See §§ 1252, 1255a(c)(4), (5); see also S. Rep. No. 132, 99th Cong., 1st Sess. 47 (1985) (QDE confidentiality provision encourages aliens to come forward "without fearing that their applications would be forwarded to the INS. . . ."); H.R. Rep. No. 99-682, *supra*, 73.

[17] *See McNary* 898 (aliens cannot obtain any review unless they "voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens"); *see also Matter of Merced*, 14 I & N Dec. 644 (BIA 1974), *aff'd mem.* 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[18] *See* 8 C.F.R. §§ 3.1(b), 103.3(a)(3)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings").

[19] *See McNary* 898-99 (under the government's approach, the courts of appeal "also would lack the factfinding and record-developing capabilities of a federal district court. . . . [S]tatutes that

6. to be deprived for years of "employment authorization," and thus suffer the severe hardship of having no legal right to work in this country, throughout this entire lengthy period.[20]

McNary concluded that it "seems plain to us . . . that restricting [generic challenges] is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899; see further, Kanstroom, "Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?" 25 HARV. C.R.-C.L. L. REV. 53 (1990). The key question then is not whether the challenges are "direct" or "collateral," but whether, as *McNary* directs, they assert a generic constitutional or statutory claim, as indeed they do.

Finally, even accepting INS' direct/collateral distinction, the present cases fall on the "collateral" side of the line. In neither of these cases did plaintiffs request, nor receive, legalization. Rather, the relief sought and ob-

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provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential. . . .").

[20] *See McNary* 892: "the mere filing of a 'non-frivolous application' entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed"; *id.* 895: "the denial of [legalized] status places the alien in an even worse position than he or she was in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons"; *see also* § 1255a(e)(2)(B) (providing employment authorization to any alien who presents a "prima facie" application for legalization); § 1255(a)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a prima facie case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period). . . .").

tained only assured constitutionally and statutorily correct adjudication of their applications *by INS*. As this Court stated in a similar context in *UAW v. Brock*, *supra*, 477 U.S. at 477, that a grant, or denial, of legalization might eventually result from these cases is irrelevant.

In short, it is hard to believe that Congress intended mandatory exhaustion of claims whose resolution would not be furthered thereby.[21] And INS' analysis completely ignores the substantial burden on immigration judges and the courts of appeal if each of the hundreds of thousands of class members in these cases were ordered deported and then raised these issues in individual appeals under § 1105a. *McNary* 898-99.[22]

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[21] This argument is actually *stronger* here than in *McNary*, since the administrative process in *McNary* could have resulted in some individuals being granted legalization despite the procedural barriers that the INS imposed. As the Solicitor General noted in *McNary*, where the alien's challenge is to the INS' legalization *procedures* (rather than to a substantive eligibility guideline), the LAU might *still* grant legalization, notwithstanding the alleged violations. *See* Brief for Pet. in *McNary* at 18 n.14 (the LAU "could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention. . . . Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue"). In the present cases, by contrast, *any* administrative review would be necessarily futile and unilluminating.

[22] Had Congress intended § 1255a(f)(1) to be more broadly inclusive, statutory language to express such an intent was readily at hand. For example, *McNary* emphasized that Congress could have modeled § 1255a(f) on the more expansive language of § 1329—the general grant of district court jurisdiction under Title II of the INA—by channeling into specialized review "all causes . . . arising under any of the provisions of [the legalization program]." *Id.* 897. Similarly, Congress could have modeled § 1255a(f) on 38 U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these broader options—thus its choice of the narrower language was surely intentional.

Indeed, the Senate's broad proposed language was expressly rejected in Conference (*see* S. Rep. No. 132 *supra*, 48) in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision" or determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" or to the provision in that section of the Senate bill for Attorney General rulemaking. Indeed, in the final version of IRCA, the Attorney General's legalization program rulemaking authority (§ 1255a(g)) is not even mentioned until *after* the specialized review provision (§ 1255a(f)), thus further indicating that rulemaking was *not* subject to that review provision.

5. **Section 1105a.** Congress incorporated § 1105a, which governs direct appellate review of INS deportation orders, into IRCA's specialized review provision: [t]here shall be judicial review of such a denial [of "a determination respecting an application"] only in the judicial review of an order of deportation under section 1105a." § 1255a(f)(4)(A). Section 1105a has been consistently interpreted, by this Court and others, to permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order.[23]

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[23] *See, e.g., El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir. 1991); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531, 535-39 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, 913 F.2d 1350, 1352 (9th Cir. 1990), *rev. on other grounds*, 112 S. Ct. 551 (1991); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984); *Salehi v. District Director, INS*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982); *Hotel & Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *see also Cheng Fan Kwok v. INS*, 392

This construction of § 1105a must be deemed to have been incorporated into IRCA. *Lindahl v. Office of Per. Mgmt.*, 470 U.S. 768, 782 n.15 (1985). The machinery of § 1105a (and its uniform body of case law) informs the meaning of "a determination respecting an application" in § 1255a(f)(3). Its incorporation shows Congress did *not* intend generic challenges to policies and regulations, which exist separate and apart from any specific individual adjudication, to be cabined by § 1255a(f). As here, they can be reviewed where there has been *no* "determination respecting an application" in an individual case.

II. REMEDY.

INS' suggestion that the district court orders tolling the application deadline contravene *INS v. Pangilinan*, 486 U.S. 875 (1988) founders for two key reasons. First, it ignores the basic difference between the unique role that courts play in the naturalization process, a role which is the determinative core of *Pangilinan*'s rationale. Second, it ignores the significant doctrinal change in this Court's equitable tolling jurisprudence articulated in *Irwin v. Veterans Administration*, 498 U.S. ——, 111 S. Ct. 453 (1990) two years after *Pangilinan*.

1. *Pangilinan* reviewed a district court order that granted naturalization to aliens who had applied after Congress' express time limit. This Court explained that the "more fundamental" problem with the order was that "the power to make someone a citizen . . . has *not* been conferred upon the federal courts, *like mandamus or injunction* . . . [except] in strict compliance with the terms of the authorizing statute. . . ." 486 U.S. at 883-84 (emph. add.). In short, this Court held that a court exercising

U.S. 206, 210 (1968) ("In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.").

naturalization powers is acting pursuant to an express Congressional delegation, more like an administrative agency that can act, like any other such agency, only strictly within its delegated powers.

Pangilinan amplified on this point in several different ways: " 'A person may be naturalized . . . in the manner . . . prescribed [in the INA], and not otherwise,' " 486 U.S. at 884, quoting § 1421(d); " 'Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to . . . grant citizenship.' " *Id.* 885 [citation omitted]; "Neither by application of the doctrine of estoppel . . . nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Id.* See further, 4 Gordon & Mailman, IMM. LAW & PROC. § 94.02[1], p. 94-24.

A district court does not act *qua district court* when it exercises naturalization powers. Rather, it is acting as a special "naturalization court," defined in § 1101(a)(24) to include, but not be limited to, district courts.[24] From 1790 to 1990, "naturalization courts" also included state or territorial courts. 4 Gordon & Mailman, *supra*, § 94.02[1], p. 94-24; see further, *id.*, pp. 94-20 to 94-26. Indeed, the hybrid nature of a naturalization court is shown by the fact that from 1906 to 1990, "naturalization was the *joint* responsibility of the courts and administrative officers. . . ." *Id.* at pp. 94-17 to 94-18, a quite unusual blending of judicial and executive powers.

2. The district court decisions to toll the May 4, 1988 application date in a limited way for injured class members, under the particular circumstances of these cases,

[24] Congress provided in the Immigration Act of 1990, P.L. 101-649, Title IV, for the cessation of the judicial naturalization so this discussion is historical, not a description of the contemporary role. Now, naturalization is an unalloyed executive function, done by the Attorney General. See further, 4 Gordon & Mailman, *supra*, § 94.01[1][f], pp. 94-11 to 94-14.

were squarely supported by the long line of cases culminating in *Bowen v. City of New York*, 476 U.S. 467 (1986) and *Irwin v. Veterans Administration*, *supra*. However, there is nothing in these cases that warrants certiorari since they call for rather simple application of the principles of those cases, which, when applied, are bottomed in Congressional intent. Each case then is peculiar to the particular text and its legislative history. Unless these very recent cases are to be jettisoned, there is no reason *in the purposes of certiorari* for the Court to return so promptly to ground just surveyed.

Irwin was a Title VII case. The lower courts rejected the claim because Irwin had filed beyond the 30-day statutory filing period, reasoning that the period was jurisdictional, the same contention as that made here. The Chief Justice's opinion for the Court frankly notes that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts." *Id.* 456. He then went on to emphasize that:

> to decide each case on an *ad hoc* basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.* *Id.* 457 (emph. add.)

The rule is a rebuttable presumption in favor of equitable tolling, just like that applicable in "suits between private litigants [which are] customarily subject to 'equitable tolling'" (citing *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 309 (1989)), with an examination of Congressional intent serving as the source of rebuttal, if any. *Irwin* 457.

The strength of this presumption can be seen from the comparison in *Irwin*, at 457, of the Title VII language at issue there ("'within thirty days . . . an employee . . . may file a civil action. . . .'") with the operative language in *Soriano v. United States*, 352 U.S 270 (1957) ("'every claim . . . shall be barred unless the petition . . . is filed . . . within six years. . . .'"), the case that essentially was overruled by *Irwin*. *Irwin* then said: "An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin* 457. The text of § 1255a(f)(2) on which INS relies is no more stringent than that of *Soriano*.

Bowen v. City of New York, 476 U.S. 467 (1986) is poignantly instructive. A class of disabled Social Security applicants sought benefits in plain contravention of the 60-day appeal period. The 60-day period was nonetheless tolled because "[w]here the Government's secretive conduct prevent[ed] plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time . . . [to allow for] a reasonable opportunity to learn the facts. . . ." *Id.* 481.

Bowen emphasized that the fundamental inquiry in such a case is if tolling would be "'consistent with the *overall* congressional purpose.'" *Id.* 480 (emph. add.). Here, such consistency is manifest since that purpose is to maximize the number of legalizable aliens, the "shadow population," *McNary* 891, in our midst. This could be accomplished only by ensuring a *full* twelve months to apply, preceded by an education and outreach period, during which undocumented aliens would get *correct* advice and be truly *encouraged* to come "out of the shadows" and apply. (See further, pp. 3-5 above.)

Bowen stressed that the Social Security Act is "'unusually protective' of claimants." *Id.* at 480. The same can

be said of Congress' insistence that IRCA be construed "in a liberal and generous fashion. . . ." H.R. Rep. No. 99-682, *supra*, 72. *Bowen*'s conclusion is doubly applicable: "All of the class members who [had failed to comply with the time limitation] were entitled to believe that their Government's determination of *ineligibility was the considered judgment of an agency faithfully executing the laws*. . . ." 476 U.S. at 480 (emph. add.). So too here.

Finally, INS' suggestion that § 1255a(f)(2)'s preclusion of judicial review of untimely applications bars equitable tolling does not withstand scrutiny. This puts the cart before the horse, the prior question being: is a constructively-filed, *nunc pro tunc* application late filed? INS assumes no equitable tolling. But, when the application period is briefly tolled *in order to fulfill* Congressional intent (here regarding the effect of "brief absences") an application filed *during that period* is not untimely. There, "tardiness" is due solely to *INS*' actions. A reasonable interpretation of § 1255a(f)(2) is that Congress could not have intended it to apply to a situation where INS' interpretation of an eligibility guideline is so unfaithful to legislative intent. (This appears to be so obvious that there is no need to resort to the "generous, liberal" standard.) It is surely fair for Congress to have concluded that when it rejected the Attorney General's views on the subject (see pp. 6-7 n.3 above), INS would have realized that the policy dispute was over.

CONCLUSION

For the reasons stated, class members in both cases urge that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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(4)

No. 91-1826

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. Respondents' discussion (Br. in Opp. 13-22) of the first question presented—whether the court of appeals properly held that it had jurisdiction over respondents' claims—does not suggest that the decision below can be reconciled with the D.C. Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), reh'g denied, 958 F.2d 1089 (1992), petition for cert. pending, No. 91-1924. Instead, respondents suggest that the case is unimportant because "IRCA's legalization programs have effectively been over for nearly four years." Br. in Opp. 13. This statement

ignores the effect of respondents' own actions: although Congress intended for the program to conclude more than four years ago, this case, if not reviewed by this Court, will result in the courts' requiring the government to consider late applications from a still-burgeoning class of more than 300,000 people, see Pet. 21 n.23. Respondents acknowledge the importance of the program, which they describe as "an extraordinary act of grace," resulting in "the largest legalization program in U.S. history, perhaps in world history." Br. in Opp. 2. Accordingly, the customary standards indicate that the petition should be granted.[1]

Having little to say that would justify denial of the petition, respondents instead engage in a lengthy presentation attempting to demonstrate that *Ayuda* is wrong and that the decision of the court of appeals is correct.[2] The opposite is true.[3]

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[1] Respondents note (Br. in Opp. 8 n.5) that INS at one point expressed the view that jurisdiction was proper after this Court's decision in *McNary*. They do not, however (and could not), suggest that the jurisdictional question is not properly before the Court. As respondents admit in the same footnote, the government reasserted its jurisdictional challenge before the court of appeals took the case under submission. Furthermore, the court of appeals actually decided the question, which was necessary to its decision granting relief against petitioners. Accordingly, the question is properly before this Court. See 28 U.S.C. 1254(1) (granting unrestricted jurisdiction over "[c]ases in the courts of appeals"); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue.").

[2] See Br. in Opp. 15 (arguing that the D.C. Circuit "simply concluded that this Court did not mean what it had plainly said"). Respondents' claim that the D.C. Circuit "ma[de] no attempt to explain" its holding is difficult to credit, in light of the lengthy discussion of the issue by the D.C. Circuit, which fills 30 pages in the appendix to the pending petition in that case, No. 91-1924. See 91-1924 Pet. App. 4a-34a. If any court is to be criticized for summary treatment of the issue, it is the court of appeals in this case, whose analysis by comparison can charitably be characterized as cursory. See Pet. App. 10a-15a.

[3] Respondents suggest (Br. in Opp. 12 n.9) that we "seriously misstat[e] the nature and effect of the district court orders." We strenuously disagree. They claim that it is untrue that the "order

a. Respondents claim that *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), strictly limited the effect of Section 1160 (and its counterpart, Section 1255a, which is involved in this case) to "review of denials of individual . . . applications." Br. in Opp. 14-15.[4] This is incorrect. Rather, the Court distinguished between two types of claims —"direct review of individual denials of * * * status * * * [and] general collateral challenges to unconstitutional practices and policies used by the agencies in processing applications," 111 S. Ct. at 896, in reaching its conclusion that IRCA did not preclude collateral challenges to the unconstitutionality of INS

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effectively bars INS from deporting any individual who submits to INS an application contending he is entitled to relief," Pet. 7 n.7, based on the government's preliminary determinations that many of the 300,000 applications received to date are plainly inadequate or fraudulent, and based on the government's refusal to agree that those applications are adequate to allow the applicants the benefits of class membership. Contrary to respondents' statements, however, respondents' counsel has made it clear that the government's refusal to agree that those applications are adequate has not ended the dispute regarding the entitlement of those persons to relief. See Letter from Peter A. Schey to Department of Justice (Mar. 4, 1992) (arguing "that all [purported] class members will have to be re-interviewed" if respondents prevail in the Supreme Court). [A copy of this letter has been lodged with the Court.]

Moreover, it is respondents who seriously misstate the record when they claim "INS has agreed" that "at least half" of the "[o]ver 300,000 putative class members * * * are prima facie eligible for legalization; so, they have temporary work/stay documents." Br. in Opp. 3. As of June 5, 1992, INS has found only 79,296 applications, far less than half, sufficiently satisfactory to justify the issuance of temporary work authorizations.

[4] We are puzzled by respondents' suggestion (Br. in Opp. 9; see *id.* at 14-15) that our current construction of the two preclusion provisions is contrary to our earlier view that the provisions should be construed identically. Nothing in our petition suggests that there is a substantive difference between the effect of the provision at issue in *McNary* and the effect of the provision at issue in this case. We believe, however, that the cases should be decided differently because respondents' claims, for the reasons set forth in our petition, differ significantly from the claims at issue in *McNary*.

procedures. This case instead involves a collateral challenge to the standards governing eligibility for relief. *McNary* is therefore not squarely on point and, as we explain in the petition (Pet. 11-14), application of the factors relied upon in *McNary* demonstrates that the Ninth Circuit erred: respondents' claims would "have the effect of establishing [respondents'] entitlement to [relief]," *McNary*, 111 S. Ct. at 898; they would be subject to meaningful judicial review under IRCA; and the administrative record would provide an adequate basis for judicial review.

b. Respondents dispute these points, first claiming (Br. in Opp. 16-19) that respondents have no opportunity for meaningful judicial review. But their basic argument is not the argument this Court accepted in *McNary*—that the *McNary* claimants suffered irreparable injury because the nature of the administrative process made it impossible for them to present a record for their claim in a way that would enable courts to evaluate the claim, see 111 S. Ct. at 896-897—but the very different claim that the procedures established by Congress are simply too time-consuming and burdensome to be pursued by an alien who has a different view of the substantive requirements for relief than the agency charged with administering the statute. See Br. in Opp. 17-18. That claim, if accepted as a basis for judicial review, would justify initial district court review not only in this case, but even in individual cases challenging INS's determinations. If the statute has made anything clear, it is that individual claimants, even if they disagree with INS's understanding of the statute, cannot secure judicial review of their claim for relief until they go through the entire process outlined on pages 17-19 of the Brief in Opposition. Logical reasoning cannot support a different result for this case, which presents a group of similarly situated aliens with a common disagreement regarding the merits of their applications.

Respondents cannot suggest a single way in which the procedures mandated by Congress for review of determinations regarding applications are inadequate to review

INS's determination regarding the substantive standards required for relief. Because the claims present nothing more than a question regarding application of the language of the statute to the facts of an individual application, and because the facts of the application will be contained in the administrative record, the statutory procedures offer every opportunity for production of an adequate record. Compare *McNary*, 111 S. Ct. at 896-897 (discussing impossible position of *McNary* plaintiffs attempting to make an administrative record to support their claims).[5]

The principal argument respondents make in support of the claim that Congress failed to provide for meaningful judicial review is their claim that review will not necessarily follow promptly. They claim INS will not be able to institute deportation proceedings against all aliens denied legalization, because the "keen evasion skills" of the aliens will prevent INS from locating them. Br. in Opp. 17 n.13. Aliens readily can obtain review, however, by voluntarily notifying INS of their whereabouts. That the statute requires an alien to choose between prompt judicial review in deportation proceedings and continued evasion of lawful process hardly suggests that the review provided is inadequate. Aliens who reside in the United States in violation of the law,[6] and who avoid deportation proceedings through the exercise of "keen evasion skills" should not be heard to complain about Congress's decision

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[5] The *McNary* Court also pointed out that the "abuse-of-discretion" standard of review provided for by Section 1255a was inappropriate for the constitutional claims at issue in *McNary*. See 111 S. Ct. at 897. This problem does not arise in this case, because respondents' claims raise an issue of law regarding interpretation of IRCA. Accordingly, they are not subject to the abuse-of-discretion standard. See Section 1255a(f)(4)(B) (requiring the "abuse-of-discretion" standard only for "the findings of fact and determinations contained in [the administrative] record").

[6] As we mentioned in the petition (Pet. 2), the only aliens who were eligible for relief under IRCA were aliens who were not lawfully in this country. Accordingly, aliens properly seeking relief under IRCA by definition are not lawfully in this country.

not to adopt a scheme that permitted them to obtain judicial review of their claims while they remained in hiding. Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (status as a fugitive "disentitles [the fugitive] to call upon the resources of the Court for determination of his claims"). Respondents' desire to avoid this choice by filing a class action cannot excuse their failure to pursue the remedies offered by Congress.

c. Third, respondents claim (Br. in Opp. 19-20) that the relief granted in these cases did not amount to legalization. That claim ignores reality. Both respondent classes effectively are limited to individuals who would have gained relief but for INS's challenged interpretations of IRCA. See Pet. 12 n.14 (quoting class definitions). Because the court of appeals has ordered INS to evaluate applications from class members without regard to the identified defects in their applications for adjustment, the inevitable effect of the relief will be to require INS to grant legalization to the actual class members.[7]

d. Finally, respondents claim (Br. in Opp. 21-22) that this action is no different from the collateral federal court challenges to deportation proceedings that have been permitted outside the deportation review procedures established in 8 U.S.C. 1105a. As we discuss in the petition (Pet. 14 n.17), we agree that Section 1105a is relevant, because it would be odd to conclude that exhaustion is not required under Section 1255a—with its express preclusion of alternate forms of judicial review—in circumstances where Section 1105a itself has been held to require exhaustion. Respondents, however, suggest that the cases

[7] Respondents' reliance (Br. in Opp. 20) on *United Automobile Workers* v. *Brock*, 477 U.S. 274 (1986), is misplaced. That case involved claimants challenging the implementing agency's interpretation of a federal statute in circumstances where, unless the claimants could proceed in federal court without exhausting their administrative remedies, review of the administrative actions would occur in state courts. See 477 U.S. at 285. Because IRCA provides for federal-court review, albeit after exhaustion of the administrative process, *Brock* is inapposite.

interpreting Section 1105a support their position, arguing that courts regularly "permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order." Br. in Opp. 21. Although this state-ment may be literally true, it is not helpful to respondents' position. Whatever the merits of the cases they cite (Br. in Opp. 21 n.23), all of them—like *McNary*—in fact involve challenges to allegedly improper procedures; none involves a claim that the agency improperly interpreted the substantive requirements for relief.[8] Accordingly, these cases cannot support respondents' attempt to extend *McNary* to that context.

2. On the second question presented, respondents do not suggest that the issue is unimportant, but instead attempt (Br. in Opp. 22-23) to defend the court of appeals' suggestion that *INS* v. *Pangilinan*, 486 U.S. 875 (1988), should be limited strictly to cases in which the court's order directly requires naturalization. As we explained in

[8] See *INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 553 (1991) (allegedly improper condition on bonds); *El Rescate Legal Services, Inc.* v. *Executive Office of Immigration Review*, 959 F.2d 742, 745 (9th Cir. 1992) (alleged violations of requirement to translate immigration proceedings); *Campos* v. *Nail*, 940 F.2d 495, 496 (9th Cir. 1991) (allegedly improper refusal to transfer venue); *Montes* v. *Thornburgh*, 919 F.2d 531, 533 (9th Cir. 1990) (allegedly improper requirement of detailed factual submissions by applicants for relief); *Salehi* v. *District Director*, 796 F.2d 1286, 1291 (10th Cir. 1986) (failure to hold hearings on motion to reopen); *Jean* v. *Nelson*, 727 F.2d 957, 961 (11th Cir. 1984) (en banc) (challenge to procedures for unadmitted aliens), aff'd on other grounds, 472 U.S. 846 (1985); *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1026 (5th Cir. 1982) (challenge to expedited procedures); *Hotel & Restaurant Employees Union, Local 25* v. *Smith*, 563 F. Supp. 157, 159 (D.D.C. 1983) (allegedly improper reliance on routine State Department recommendations against granting relief for Salvadorans); *Orantez-Hernandez* v. *Smith*, 541 F. Supp. 351, 354 (C.D. Cal. 1982) (challenge to various procedures allegedly used with respect to Salvadoran nationals). The final case cited by respondents, *Abdelhamid* v. *Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985), is not apparently relevant. It does not involve deportation and the court of appeals ordered dismissal for want of jurisdiction.

the petition (Pet. 18), that argument eviscerates *Pangilinan*, because it would allow any court to reach the same substantive result simply by recrafting the terms of its order so that they would not directly require naturalization. Nothing in this Court's analysis suggests that it is permissible for federal courts to contravene statutory deadlines so readily.

Respondents also argue (Br. in Opp. 23-26) that the court of appeals' decision is nothing more than a commonplace application of the doctrine of equitable tolling discussed in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). There are several significant problems with this argument. First, and most importantly, the argument assumes that the timeliness requirement is a statute of limitations. That is not correct. As the structure of the statute makes clear, the timeliness requirement is one of the four substantive requirements for relief, set forth in the four paragraphs of Section 1255a(a). Because Congress intended to create a program of limited duration, it provided that the class of eligible aliens would include only aliens who sought relief within the designated twelve-month period.[9] The court of appeals erred in assuming the power to ignore this requirement.[10]

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[9] Congress's intent to provide a program of a strictly limited duration is made especially clear by the express preclusion of any judicial review for any denial "based on a late filing of an application." Section 1255a(f)(2). This clear bar on extensions of the deadline completely differentiates this case from *Bowen* v. *City of New York*, 476 U.S. 467 (1986). As the Court noted, the statute at issue in *Bowen* expressly authorized tolling of the filing requirement by the Secretary. See *id.* at 480. Moreover, as the Court subsequently has noted, *Bowen* turned on the fact that the challenged policy was "a secret, internal policy," rather than a published regulation. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). Because the respondent classes by definition include only people who knew about the policy (see Pet. App. 25a-26a; Pet. 6), *Bowen* is inapplicable.

[10] See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981) (summarily reversing a court of appeals decision waiving an application requirement based on allegations that the claimant failed to file based on the agency's advice that the claimant was ineligible for relief; explaining that "[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

In any event, the facts of this case are plainly inadequate to support equitable tolling. As the Court explained in *Irwin*, equitable tolling typically is available when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 111 S. Ct. at 458. Respondents plainly did not "actively pursu[e] [their] remedies"; their failure to file timely applications is the cause of the dispute. Nor is it fair to say that they were somehow tricked into not filing by the government's misconduct. The sole government conduct at issue is the government's promulgation of its understanding of the statutory requirements, which differed from respondents' understanding. The government in no way misrepresented the date of the deadline or the requirements for filing. Rather, it simply advised respondents that it believed they would not be entitled to relief even if they did file. The clear inadequacy of this as a basis for equitable tolling is evident from the consequences of respondents' argument; if a party's expression of its belief that it would prevail in litigation were sufficient to toll a statute of limitations, there would never be a bar of limitations in any case in which the defendant disclaimed liability. Accordingly, there is no basis for application of the doctrine of equitable tolling in this context.[11]

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[11] Based on legislative history acknowledging the "liberal and generous" nature of IRCA, respondents argue that the Court, whenever it interprets IRCA, should resolve "any doubts * * * in favor of an interpretation maximizing the number of eligible aliens whose status is thereby regularized." Br. in Opp. 4; *id.* at 25 ("purpose [of IRCA] is to maximize the number of legalizable aliens"). We disagree. To be sure, the legislative history strongly suggests that Congress in some respects desired a liberal and generous interpretation of IRCA. The

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1992

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statute, as enacted, however, represents a compromise between competing principles. Thus, courts must give effect to the language of the entire statute, even when that language limits the generosity evidenced by IRCA as a whole. As this Court has put it:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987). This is particularly true in a case like this one, where the competing purpose —a desire to place firm temporal limitations on the program—is clear from the face of the statute. See *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("[T]he plea of limitations [is] a meritorious defense, in itself serving a public interest." (internal quotation marks omitted)).

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PETITION FOR WRIT OF CERTIORARI FILED: MAY 13, 1992
CERTIORARI GRANTED: JUNE 22, 1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1826

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 86-1343

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
11-12-86	1	Complt; sums issd; Mag's consent forms
		• • • • •
11-24-86	19	*ORD:* grnt provisional class certification
	20	*ORD:* Temporary Restraining Order; deft to show cause why preliminary injunction should not ne issued on 12/18 at 9:30 *MIN:* pltf mot/TRO grntd; crt to prep ord; briefs to be filed -OB 10 days; oppo 5 days; security bond $1; PI set 12/18/86 at 9:30
		• • • • •
4-6-87	48	Cert cpy of judgt fr CA-9 reversing and remanding to DC
		• • • • •

DATE	NR	PROCEEDINGS
5-3-88	162	ORD: Modification to the Class Certification Order – See Order for Details
	163	ORD: Pltfs' Motion for SJ is GRANTED – See Order for Details
		* * * * *
6-10-88	168	ORD: See Order for Details (lg ord)
6-20-88	169	NOTC OF APPEAL BY FED DEFENDANTS Notc by DC/Clk to 9CA/forms attached
		* * * * *
6-24-88	174	ORD: GRANTING Proposed order for Partial stay lodged 6-24-88
		* * * * *
7-7-88	178	Pltf's NOTC OF APPEAL OF DC COURT ORDER OF 6-10-88 -88-15046
7-8-88		CLK'S NOTC/FORMS RE: APPEAL TO THE 9CA – notc to all parties
7-11-88		Recv'd ltr dated 7-2-88, signed Peter A. Schey
		* * * * *
8-8-88	186	NOTC OF APPEAL BY FED DEFTS – form to 9CA and parties
8-11-88	187	ORD: Court's ord or 6-24-88 is VACATED; All portions of this crt's 6-10-88 ord are of full force and effect. Pltfs' mot for reconsideration or in the alternative for suppl relief is GRANTED. This Crt's ord of

DATE	NR	PROCEEDINGS
		6-10-88 is suppl by the Suppl Ord I have filed together with this opinion. See Order for Details; Deft's Mot for a stay pending appeal or pending disposition of a motion for a stay by the Ninth Circuit is DENIED.
	188	ORD: See Order for details; Pltfs' Mot for SJ on the legality of the 6-26-87 dutoff date is GRANTED. Crt has now resolved all the substantive issues tendered by the instant lawsuit, i.e., the validity of the cutoff dates and the regulation dealing with "brief, casual and innocent" absences.
8-11-88	189	ORD: that this crt's order of 6-10-88 is supplemented as follows: See Order for Details
		* * * * *
8-16-88	191	DEFT'S NOTC OF APPEAL – re: two orders entered 8-11-88 – notc to all parties
8-18-88		CLK'S NOTC TO ALL PARTIES AND 9CA
8-23-88		Recv'd confirmation ltr for Appl filed 8-16-88
8-25-88		Rec'd Copy of 8-19-88 Ltr to Atty Schey and Abascal from Robert Kendall, Jr. Office of Immigration Litigation re enclosing with his letter information that will be required by INS to properly implement the

DATE	NR	PROCEEDINGS
		Court's order if a stay is not granted by the Nith Circuit
		* * * * *
9-2-88	194	CERTIFICATE OF RECORD to 9CA (88-15046)
		* * * * *
5-6-92	197	COPY of Appellate Court Order: case remanded to USDC during pendency of stay of mandate to enforce stay until final disposition of case after filing of writ of certiorari for Supreme Court (kw) [Entry date 05/07/92]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. 87-4657

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR		PROCEEDINGS
7-22-87	jcw	1	Complt. Issd Summs.
7-15-88	esl	63	MEMO OPINION & ORD pltfs' challenge to the modified policy adopted by the INS & codified at 8 C.F.R. §§ 254a.1(b) (9) & (b) (10) is w/o merit. Accordingly, S/J on this issue shall be ent in favor of defts. (ENT 7-18-88) Mld cpys & notc to all ptys.
8-12-88	esl	70	OPINION & ORD re relief, tht pltfs' request for injunctive relief is GRANTED. ORD tht S/J re the relief available to pltfs in subclass one shall be ent in favor of pltfs in subclass one, FUR ORD tht the INS is enjoined frm refusing to accept applics for an adjustment of status of those

DATE	NR	PROCEEDINGS
		aliens who fall w/in subclass one, beginning immediately & ending 11/30/88, or, if defts seek & are granted a stay of this Ord, & if this Crt's Ord is thereafter affirmed by the 9th Circuit, for a period of 120 days after such affirmance, & PROVIDED tht the alien contemporaneously provide a sworn affi attesting tht he or she falls w/in subclass one, & PROVIDED FUR tht if an alien is represented by cnsl, cnsl shall provide a sworn affid tht to the best of his or her knowledge after reasonable inquiry, the alien meets the requirements of subclass one, etc. FUR ORD tht this Crt shall cont to retain jurisdiction to assure tht this Ord is carried out fully & completely & to provide such other & fur relief or modifications as may be necessary. (ENT 8/15/88) Mld cpys & notcs to all ptys. MD JS-6.
9-3-88	vg	77 Deft's Fld NOTC OF APPEAL to 9th Cir. C/A frm ord ent 8-15-88. FEES WAIVED GOVNT APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 88-15046

CATHOLIC SOCIAL SERVICES, INC.,
ET AL., PLAINTIFFS-APPELLANTS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

RELEVANT DOCKET ENTRIES

DATE	FILING-PROCEEDINGS
7-28-88	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. Fee payment due 8/11/88. Sent Ralph Santiago Abascal, Esq. (ot) [88-15046]
	* * * * *
8/22/88	Filed Appellant Catholic Social in 88-15046, Appellant Calif Coalition in 88-15046, Appellant Mercedes Aguilar De Lopez in 88-15046, Appellant Maria Teresa Reyes in 88-15046, Appellant Sara Orantes De Palacios in 88-15046, Appellee Edwin Meese in 88-15046's motion for interium temporary stay further action (CIVATT) [88-15046] served on 8/19/88 [1139982] (ck) [88-15046]

DATE	FILING-PROCEEDINGS
8-22-88	Filed joint mtn of aplts & aples for temporary, interim stay stay pending disposition of aplt's mtn for stay. (CIVATT) [88-15046] served on 8/19/88 [1140726] (db) [88-15046]
8-22-88	Filed aple/cross-aplt (Thornburgh) emergency mtn for stay of dc order pending appeal, and for expedited treatment of appeals (CIVATT) [88-15046, 88-15127] [88-15046, 88-15127]; served on 8/19/88 [1140766] (db) [88-15046 88-15127]
8-22-88	Filed order (BEEZER) The joint application for a temporary interim stayu pending disposition of the govt's motion for a stay pending appeal is granted. The dc's order of 6/10/88 is stayed pursuant to the terms and conditions of the dc's order of 6/24/88 through and including 9/1/88. [1140766-1] in 88-15046, 88-15127 [88-15046, 88-15127] (ck) [88-15046 88-15127]
8-30-88	Filed joint mtn of pltfs/aples/cross-aplts and deft/aplt/aple for continuance of interim stay pending disposition of aplt's mtn for stay. (requesting stay continue until 9/6/88) (CIVATT) [88-15046, 88-15127] served on 8/29/88 [1173006] (db) [88-15046 88-15127]
8-30-88	Filed order (BEEZER) The joint motion for a temporary interim staypending disposition of the govt's motion for a stay pending appeal is granted. The dc's order of 6/10/88, is stayed pursuant to the terms and conditions of the dc's order of 6/24/88, through and including 9/6/88. [1173006-1] in 88-15046, 88-15127 [88-15046, 88-15127] (ck) [88-15046 88-15127]

DATE	FILING-PROCEEDINGS
	• • • • •
9-21-88	Filed order (BROWNING, LEAVY) The order of 9/20/88 entered in 88-15127 is amended as follows: Appeal 88-15128 is consolidated with 88-15127. The COR filed in 88-15046 is deemed the certificate in 88-15127. The COR requirement is waived in 88-15128. Appeals 88-15127, 88-15128 and 88-15046 are released from the prebriefing conference program. The Clerk shall calendar these appeals for a November hearing in SF. The briefing schedule for these 3 appeals is as follows: Defendant shall file the opening brief, not to exceed 75 pages, on or before 9/30/88. Plaintiff shall file the answering/opening brief, not to exceed 75 pages on or before 10/12/88; Defendant shall file the reply/answering brief, not to exceed 50 pages on or before 10/19/88. Plaintiff shall file the reply brief, not to exceed 25 pages on or before 10/26/88. No motions for extensions of time or motions to exceed the page limits will be granted. The parties shall serve opposing counsel by overnight mail. setting cross appeal briefing schedule as follows: first cross-appeal brief is due 9/30/88 for Richard Thornburgh in 88-15046, for Richard Thornburgh in 88-15127, for Richard Thornburgh in 88-15128 second brief on cross-appeal is due 10/12/88 for Catholic Social in 88-15046, for Calif Coalition in 88-15046, for Mercedes Aguilar De Lopez in 88-15046, for Maria Teresa Reyes in 88-15046, for Sara Orantes De Palacios in for Catholic Social in

DATE	FILING-PROCEEDINGS
	88-15127, for Calif Coalition in 88-15127, for Mercedes Aguilar De Lopez in 88-15127, for Maria Teresa Reyes in 88-15127, for Sara Orantes De in 88-15127, for Catholic Social in 88-15128, for Calif Coalition in 88-15128, for Mercedes Aguilar De Lopez in 88-15128, for Maria Teresa Reyes in 88-15128, for Sara Orantes De Palacios in 88-15128 third brief on cross-appeal is due 10/19/88 for Richard Thornburgh in 88-15046, for Richard Thornburgh in 88-15127, for Richard Thornburgh in 88-15128 cross-appeal reply brief is due on 10/26/88 for Catholic Social in 88-15046, for Calif Coalition in 88-15046, for Mercedes Aguilar De Lopez in 88-15046, for Maria Teresa Ryes in 88-15046, for Sara Orantes De in 88-15046, for Richard Thornburgh in 88-15046, for Catholic Social in 88-15127, for Calif Coalition in 88-15127, for Mercedes Aguilar De Lopez in 88-15127, for Maria Teresa Ryes in 88-15127, for Sara Orantes De in 88-15127, for Catholic Social in 88-15128, for Calif Coalition in 88-15128, for Mercedes Aguilar De Lopez in 88-15128, for Maria Teresa Ryes in 88-15128, for Sara Orantes De Palacios in 88-15128 [88-15046, 88-15127, 88-15128] (ck) [88-15046 88-15127 88-15128]
	* * * * *
11/18/88	ARGUED AND SUBMITTED TO: Alfred T. GOODWIN in 88-15046, Joseph T. SNEED in 88-15046, Proctor R. HUG in 88-15046 [88-15046, 88-15127, 88-15128] (rk) [88-15046 88-15127 88-15128]

DATE	FILING-PROCEEDINGS
11-18-88	Received Aplts'/Cross Aples' Add'l. cites. (PANEL) [88-15046, 88-15127, 88-15128] (rk) [88-15046 88-15127 88-15128]
11-18-88	PRH, author [88-15046, 88-15127, 88-15128] [88-15046, 88-15127, 88-15128] (dm) [Entry date 11/21/88] [88-15046 88-15127 88-15128]
	* * * * *
12-28-88	Filed order (GOODWIN, SNEED, HUG): Plaintiff-appellees' motion to submit a supplemental memorandum is granted. The memorandum received 11/28/88 is ordered filed. [1485134-1] in 88-15046, 88-15127, 88-15128 [88-15046, 88-15127, 88-15128] (ck) [88-15046 88-15127 88-15128]
1-6-89	Filed order (GOODWIN, SNEED, HUG): Due to consolidation of the above-entitled cases and additional briefing ordered by the court, submission of this consolidated appeal shall be withdrawn pending further order of this court. [88-15046, 88-6447, 88-15127, 88-15128] (vt) [88-15046 88-15127 88-15128 88-6447]
	* * * * *
6-28-90	Filed order (GOODWIN, SNEED, HUG): Submission of these cases is withdrawn and deferred pending the decision of the United States Supreme Court in the case of Haitian Refugee Center, Inc. v. Nelson, upon which the petition for a writ of certiorari, No. 89-1332, has been granted. [88-15046, 88-6447, 88-15127, 88-15128] (sm) [88-15046 88-15127 88-15128 88-6447]
	* * * * *

DATE	FILING-PROCEEDINGS
2-5-92	Case resubmitted on this date to Alfred T. GOODWIN, Joseph T. SNEED, Proctor R. HUG. (See previous deferral of submission.) [88-15046, 88-6447, 88-15127, 88-15128] (wd) [Entry date 02/23/92] [88-15046 88-15127 88-15128 88-6447]
2-5-92	Proposed disposition circulated by PRH to ATG, JTS. [88-15046, 88-6447, 88-15127, 88-15128] [NOTE: this is NOT public information] (fb) [Entry date 03/19/92] [88-15046 88-15127 88-15128 88-6447]
2/10/92	Filed order (Alfred T. GOODWIN, Joseph T. SNEED, Proctor R. HUG): The case of Catholic Social Services, Inc. v. Thornburgh, Nos. 88-15046, 88-15127, and 88-15128, is hereby resubmitted as of Feb. 5, 1992. The case of League of United Latin American Citizens v. INS, No. 88-6447, is hereby submitted as of 2/5/92. [88-15046 88-15127 88-15128 88-6447]
2-13-92	FILED OPINION: (Terminated on the Merits after Oral Hearing (88-6447 Terminated on the Merits without Oral Hearing); Affirmed and Remanded; Written, Signed, Published. Alfred T. GOODWIN; Joseph T. SNEED; Proctor R. HUG, author.) FILED AND ENTERED JUDGMENT. [88-15046, 88-6447, 88-15127, 88-15128] (dl) [Entry date 02/21/92] [88-15046 88-15127 88-15128 88-6447]
	• • • • •
5-2-92	Filed order (GOODWIN, SNEED and HUG): Upon due consideration of the plaintiffs'

DATE	FILING-PROCEEDINGS
	motion for issuance of the mandate, and the defendants' response thereto, and the defendants' motion for a stay, and the plaintiffs' response thereto, IT IS ORDERED: 1. The mandate of this Court in these cases is stayed pending the timely filing of a petition for a writ of certiorari. If the petition is granted, the mandate shall remain stayed pending the Supreme Court's disposition of the case. 2. During the pendancy of this stay of mandate, the existing stay orders heretofore issued relating to the alien class shall remain in full force and effect. 3. These cases are remanded to the respective district courts for the limited purpose of enforcing the stay orders until final disposition of these cases. [2102359-1] in 88-15046, 88-6447, 88-15127, 88-15128, [88-15046, 88-6447, 88-15127, 88-15128] (tm) [88-15046 88-15127 88-15128 88-6447]
5-18-92	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-01826 filed on 05/13/92. [88-15046, 88-6447] (ot) [Entry date 05/29/92] [88-15046 88-6447]
	• • • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL NO. CIV S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, MERCEDES AGUILAR DE LOPEZ, MARIA TERESA REYES, SARA ORANTES DE PALACIOS, JOSE GUERRERO SARAVIA, EFREN GONZALEZ, LORENZA SANCHEZ BENUTO, CARLOS ALBERTO MEDINA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, DEFENDANT.

[FILED NOV 24, 1986]

(PROPOSED) ORDER GRANTING PROVISIONAL CLASS CERTIFICATION

Plaintiffs having applied in conjunction with their Application for Temporary Restraining Order for an order granting class certification on a provisional basis; and

This Court having determined that it will issue a Temporary Restraining Order sought by the plaintiffs; and

It appearing that a provisional certification of the class is necessary in order to provide effective preliminary relief to maintain the status quo during litigation of this case; and

It further appearing that the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure are met in this case:

IT IS ORDERED that,

1. This action is provisionally certified as a class action and shall be maintained as such until further order of the Court;

2. The Temporary Restraining Order entered by this Court shall bind the defendant, his agents and employees with respect to the entire class;

3. The class shall be comprised of these persons:

> All persons who have been or may be apprehended and have been or may be deported or issued voluntary departure by defendant (1) who are believed by defendant to be deportable aliens who can establish a prima facie claim for adjustment of status to temporary resident under § 245A(e)(1) of the INA, as amended, *or*; (2) who are believed by defendant to be deportable or excludable aliens who can establish a non-frivolous claim for adjustment of status to temporary resident under § 210(d)(i) of the INA, as amended.

4. The class representatives shall be: Catholic Social Services, Inc. (Centro de Guadalupe Immigration Center), California Coalition of Welfare Rights Organizations, National Center for Immigrants' Rights, Inc., United California Mexican-American Association, Mercedes Aguilar de Lopez, Maria Teresa Reyes, Sara Orantes de Palacios, Jose Guerrero Saravia, Efren Gonzalez, Lorenza Sanchez Benuto and Carlos Alberto Medina.

5. The Court shall retain the power to modify, amend, or revoke the class certification throughout the pendency of the action.

DATED: November 24, 1986

/s/ [SIGNATURE ILLEGIBLE]
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE # Civ S-86-1343-LKK

CATHOLIC SOCIAL SERVICES

v.

MEESE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on 11-25-86 I served a copy of the attached Orders (2) by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptable located in the Clerk's Office.

SERVED BY INTER-OFFICE
Judge Karlton
Peter Nowinski
Glen Williams

SERVED BY MAIL
Ralph Santiago Abascal
California Rural Legal Assistance, Inc.
2111 Mission St., Ste. 401
San Francisco, CA 94110

Peter A. Schey
National Center for Immigrants Rights, Inc.
256 South Occidental Blvd.
Los Angeles, CA 90057

Elizabeth Sandoval
Catholic Social Services, Inc.
Immigration Center
730 S St.
Sacramento, CA 95814

/s/ S. FURSTENE
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL NO. CIV S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, MERCEDES AGUILAR DE LOPEZ, MARIA TERESA REYES, SARA ORANTES DE PALACIOS, JOSE GUERRERO SARAVIA, EFREN GONZALEZ, LORENZA SANCHEZ BENUTO, CARLOS ALBERTO MEDINA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, DEFENDANT.

[LODGED NOV 24, 1986]

(PROPOSED) TEMPORARY RESTRAINING ORDER

Plaintiffs having applied for a temporary restraining order, and based upon the supporting declarations and other exhibits, and the points and authorities in support of the application, and the Court being fully advised in the premises, GOOD CAUSE APPEARING THEREFORE,

IT IS ORDERED THAT defendant, and all persons acting by, through or under him, or subject to his control

or supervision, is restrained from removing or causing the removal of any alien from the United States unless and until he implements sections 245A and 210 of the INA, as amended by the IRCA, by:

1. Providing national instructions that persons who prima facie qualify for legalization under Sections 245A and/or 210 shall not be expelled from the country solely on the basis of a brief, innocent and casual unauthorized departure from the country and subsequent reentry without inspection on or after the date of enactment of the IRCA, November 6, 1987.

2. Advising all aliens, who prima facie qualify for legalization under Sections 245A and/or 210, and who have been issued orders to depart the country under deportation or voluntary departure, that such orders have been temporarily suspended in order to allow said aliens an opportunity to apply for the benefits of legalization.

3. Requiring that INS or Border Patrol agents at ports-of-entry advise departing aliens, who prima facie qualify for legalization under Sections 245A and/or 210, as they turn in their INS Form I-94 or other departure record, that such aliens appear to qualify for legalization and need not depart the country if they wish to apply for legalization.

4. Publication in the Federal Register of substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability, and rules of procedure that impact substantial rights, relating to Sections 245A and 210, and, in addition, shall, to the extent that any interim rules, except interpretive rules, general statements or policy, or rules of agency organization, procedure or practice, are promulgated, such rules shall include directions to all of his agents to advise any person, apprehended in the United

States, or who appear or are apprehended at the borders or ports of entry of the United States, in the belief that he or she is a deportable alien, that deportation must be stayed and work authorization granted if the person can make out a nonfrivolous case for adjustment of status pursuant to such sections, and the method to be utilized for asserting such rights, all in a manner clearly understandable to such person, by use of the advisal attached hereto as Exhibit A.

IT IS FURTHER ORDERED, that the defendant show cause before this Court in the United States District Courthouse, 650 Capitol Mall, Sacramento, California, on the __ day of December, 1986, at __ o'clock, __.M., or as soon thereafter as counsel can be heard, why a preliminary injunction should not be issued herein pursuant to Rule 765(a) of the Federal Rules of Civil Procedure, enjoining the defendant therein as aforementioned.

DATED: November __, 1986, at __.M.

UNITED STATES DISTRICT JUDGE

Presented by
/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Glen Williams, Asst. U.S. Atty. has been served with copies of Proposed TRO, Declaration of Peter Schey & Declaration of Carlos Medina.

/s/ Peter A. Schey
PETER A. SCHEY
11-24-86

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, MERCEDES AGUILAR DE LOPEZ, MARIA TERESA REYES, SARA ORANTES DE PALACIOS, JOSE GUERRERO SARAVIA, EFREN GONZALEZ, LORENZA SANCHEZ BENUTO, CARLOS ALBERTO MEDINA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, DEFENDANT.

[LODGED NOV 24, 1986]

TEMPORARY RESTRAINING ORDER

Plaintiffs having applied for a temporary restraining order, and based upon the supporting declarations and other exhibits, and the points and authorities in support of the application, and the Court having been advised by oral arguments on the premises, GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED THAT defendant, and all persons acting by, through or under him, or subject to his control or supervision, is restrained as follows:

1. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act ("IRCA"), on the basis of a brief, innocent and casual unauthorized departure from the country and subsequent re-entry without inspection on or after the date of the enactment of the IRCA, November 6, 1986. This order is stayed for five (5) days.

2. Accepting an INS Form I-94, or other departure record, from any alien who is prima facie eligible for legalization under §§ 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act. In the alternative, the agents may accept the departure forms without further inquiry or duty if at the place of depositing or collecting such forms found at the ports of entry and departure to Mexico, there is present a sign sufficiently large so that it may be read easily from a distance of five feet in English and Spanish which reads as follows:

> "IF YOU ARE DEPARTING FROM THE UNITED STATES UNDER A DEPORTATION ORDER OR VOLUNTARY DEPARTURE ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE, AND EITHER:
>
> (1) HAVE BEEN PHYSICALLY IN THE UNITED STATES SINCE JANUARY 1, 1982, EXCEPT FOR BRIEF, CASUAL AND INNOCENT DEPARTURES; OR
>
> (2) WORKED IN SEASONAL AGRICULTURAL SERVICES IN THE UNITED STATES FOR AT LEAST 90 MAN-DAYS DURING THE

> TWELVE MONTHS PERIOD ENDING ON MAY 1, 1986.
>
> YOU MAY NOT HAVE TO DEPART THE UNITED STATES.
>
> YOU MAY WISH TO REMAIN AND CONTACT THE IMMIGRATION AND NATURALIZATION SERVICE, AN IMMIGRATION LAWYER, OR AN ORGANIZATION WHICH HELPS PEOPLE WITH IMMIGRATION PROBLEMS."

This order is stayed for ten (10) days to permit implementation.

3. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the IRCA, until he publishes in the Federal Register substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability, and rules of procedure that impact substantial rights, relating to §§ 245A and 210.

This order is stayed for ten (10) days to permit publication.

IT IS FURTHER ORDERED that the defendant shall show cause before the United States District Court, 650 Capitol Mall, Sacramento, California, on the 18 day of Dec., 1986, at 9:30 o'clock, why a preliminary injunction should not be issued herein enjoining the defendants therein as aforementioned.

IT IS SO ORDERED.

DATED: November 24, 1986.

/s/ Lawrence K. Karlton

LAWRENCE K. KARLTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

CASE # Civ S-86-1343-LKK

CATHOLIC SOCIAL SERVICES

v.

MEESE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on 11-25-86 I served a copy of the attached Orders (2) by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptable located in the Clerk's Office.

SERVED BY INTER-OFFICE

Judge Karlton
Peter Nowinski
Glen Williams

SERVED BY MAIL

Ralph Santiago Abascal
California Rural Legal Assistance, Inc.
2111 Mission St., Ste. 401
San Francisco, CA 94110

Peter A. Schey
National Center for Immigrants Rights, Inc.
256 South Occidental Blvd.
Los Angeles, CA 90057

Elizabeth Sandoval
Catholic Social Services, Inc.
Immigration Center
730 S St.
Sacramento, CA 95814

/s/ S. FURSTENE
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-2907
DC CV-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.,
ET AL., PLAINTIFFS-APPELLEES

vs.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE
UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[FILED APR 6, 1987]

JUDGMENT

APPEAL from the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-2907
DC CV-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.,
ET AL., PLAINTIFFS-APPELLEES

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[FILED APR 3, 1987]

Appeal from the United States District Court
for the Eastern District of California
The Honorable Lawrence K. Karlton,
Chief District Judge, Presiding
Argued and Submitted February 11, 1987
San Francisco, California
Filed: Apr 3, 1987

Counsel:

Mark B. Stern, Washington, D.C.
for the Defendant-Appellant

Peter A. Schey and Ralph S. Abascal,
Los Angeles, California
for the Plaintiffs-Appellees.

Before: ANDERSON, ALARCON, and HALL, Circuit Judges.

OPINION

J. BLAINE ANDERSON, Circuit Judge:

The heart of this matter concerns whether aliens apprehended for illegal reentry into the United States after November 6, 1986, who may otherwise be eligible for legalization under the Immigration Reform and Control Act of 1986, are deportable because they interrupted the requirement of continuous physical presence by leaving the United States without INS authorization.

I

This is a class action challenging the Attorney General's implementation, through the Immigration and Naturalization Service, of the Immigration Reform and Control Act of 1986 ("IRCA" or "Act"), Pub. L. No. 99-603. The President signed the Act into law on November 6, 1986, and it became effective on that date. The Immigration and Naturalization Service (INS) interpreted the Act to require illegal aliens who were in the United States after November 6, 1986 and who were prima facie eligible to apply for legalization under the Act, to obtain INS advance authorization before leaving the country. Accordingly, the INS apprehended a number of individuals, including some of the named plaintiffs, who had been in the country and were eligible for legalization under the Act except that they had departed and reentered the United States illegally after November 6, 1986. The INS sought to exclude these individuals from reentering the country, of if they had reentered, to deport them.

Plaintiffs filed this class suit on November 12, 1986, asking the district court to enjoin the INS from deporting aliens who could, but for their unauthorized departure and reentry, establish a prima facie claim for legalization

under the Act. the district court provisionally certified the suit as a class action and plaintiff Catholic Social Services ("CSS"), et al. as the class representatives.[1] On November 24, 1986, the district court issued a temporary restraining order restraining the INS from: (1) removing an alien from the United States who otherwise was prima facie eligible for legalization, (2) accepting a departure record from an alien with a claim to legalization who wished to leave the country or, in the alternative, accepting such records if the INS posted signs informing the aliens of their rights, and (3) deporting any alien with a claim to legalization until rules implementing the Act were published in the Federal Register.[2]

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[1] The district court provisionally certified the suit as a class action under Fed. R. Civ. P. 23(b)(2) with members consisting of:

> "All persons who have been or may be apprehended and have been or may be deported or issued voluntary departure by defendant (1) who are believed by defendant to be deportable aliens who can establish a prima facie claim for adjustment of status to temporary resident under § 245A(e)(1) of the INA, as amended, *or*; (2) who are believed by defendant to be deportable or excludable aliens who can establish a nonfrivolous claim for adjustment of status to temporary resident under § 210(d)(i) of the INA, as amended."

[2] Specifically, the temporary restraining order stated as follows:

> IT IS ORDERED, that defendant, and all persons acting by, through, or under him, or subject to his control or supervision, is restrained as follows:
>
> 1. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act ("IRCA"), on the basis of a brief, innocent and casual unauthorized departure from the country and subsequent re-entry without

inspection on or after the date of the enactment of the IRCA, November 6, 1986. This order is stayed for five (5) days.

2. Accepting an INS Form I-94, or other departure record, from any alien who is prima facie eligible for legalization under §§ [sic] 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act. In the alternative, the agents may accept the departure forms without further inquiry or duty if at the place of depositing or collecting such forms found at the ports of entry and departure to Mexico, there is present a sign sufficiently large so that it may be read easily from a distance of five feet in English and Spanish which reads as follows:

> "IF YOU ARE DEPARTING FROM THE UNITED STATES UNDER A DEPORTATION ORDER OR VOLUNTARY DEPARTURE ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE, AND EITHER:
>
> (1) HAVE BEEN PHYSICALLY IN THE UNITED STATES SINCE JANUARY 1, 1982, EXCEPT FOR BRIEF, CASUAL, AND INNOCENT DEPARTURES; OR
>
> (2) WORKED IN SEASONAL AGRICULTURAL SERVICES IN THE UNITED STATES FOR AT LEAST 90 MAN-DAYS DURING THE TWELVE MONTH PERIOD ENDING ON MAY 2, 1986, YOU MAY NOT HAVE TO DEPART THE UNITED STATES.
>
> YOU MAY WISH TO REMAIN AND CONTACT THE IMMIGRATION AND NATURALIZATION SERVICE, AN IMMIGRATION LAWYER, OR AN ORGANIZATION WHICH HELPS PEOPLE WITH IMMIGRATION PROBLEMS."

This order is stayed for ten (10) days to permit implementation.

3. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the IRCA, until he publishes in the Federal Register substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability, and rules of procedure that impact substantial rights, relating to §§ 245A and 210.

The Attorney General appealed the district court's issuance of the temporary restraining order and sought an emergency stay pending appeal. A motions panel of this court construed the restraining order as a preliminary injunction, finding it appealable under 28 U.S.C. § 1292(a)(1). The motions panel then stayed enforcement of the district court's order pending resolution of this appeal, and set the case for an expedited appeal.[3] Subsequently, on January 15, 1987, the INS issued a "telegram" to give aliens notice of the advance parole authorization requirement if they intended to leave the United States.

II

1. Jurisdiction

The motions panel construed the temporary restraining order as a preliminary injunction appealable under 28 U.S.C. § 1292(a)(1). While we give deference to motions panel decisions made in the course of the same appeal, this court has an independent duty to decide whether we have jurisdiction. *See United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (reviewing a motions panel decision as establishing the law of the case with respect to jurisdiction). Thus our initial inquiry is to determine whether we have jurisdiction over this appeal.

On November 24, 1986, the district court issued a temporary restraining order ("TRO"). Ordinarily, a TRO is not an appealable order over which we have jurisdiction. *St. Helen v. Wyman*, 222 F.2d 890 (9th Cir. 1955). The reason for nonappealability is that a temporary restraining

[3] The motions panel heard oral argument on the stay be telephone conference on December 3, 1986 and filed its decision on the same day.

order is not a final decision under 28 U.S.C. § 1291.[4] 7—Pt. 2 Moore's Federal Practice ¶ 65.05 (2d ed. 1986). *See also Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88, 89 (9th Cir. 1970); *St. Helen*, 222 F.2d at 890.

However, jurisdiction will lie in this court where the TRO can be considered a preliminary injunction for purposes of 28 U.S.C. § 1292(a)(1).[5] *See Northern Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousemen's Union Local No. 60*, 685 F.2d 344, 347 (9th Cir. 1982). The terminology used to characterize the district court's order "does not control whether an appeal is permissible under § 1292." *Northern Stevedoring*, 685 F.2d at 347. Instead, we look to the substance of the proceeding below.

We find the reasons for nonappealability of a TRO do not apply here. The order directed the Attorney General

[4] The statute, 28 U.S.C. § 1291, provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (3) and 1295 of this title.

[5] The statute, 28 U.S.C. § 1292(a)(1), provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

to take drastic action, i.e., not deport otherwise illegal aliens who entered the United States without inspection. Such action goes beyond merely preserving the status quo and impairs the Immigration and Naturalization Service's ability to control the borders and prevent illegal immigration. *Cf. Fernandez-Rogue v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) (construction of a TRO as a preliminary injunction is determined by considering whether the order merely preserves the status quo or grants the relief requested); *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) ("When an order directs action so potent with consequences so irretrievable, we provide immediate appeal to protect the rights of the parties"). We find these circumstances justify treating the TRO as a *de facto* preliminary injunction appealable under § 1292(a)(1).

2. Standard of Review

A preliminary injunction is subject to limited review. The grant or denial of a preliminary injunction is within the discretion of the district court and must be affirmed unless that discretion was abused. *Zepeda v. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983). Our inquiry is confined to considering the balance of hardships and the plaintiffs' likelihood of success on the merits. *National Center for Immigrants Rights v. I.N.S.*, 743 F.2d 1365, 1369 (1984) (citing *Benda v. Grand Lodge of the Int'l Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. denied*, 441 U.S. 937 (1979)), *aff'd on other grounds*, 791 F.2d 1351 (9th Cir. 1986), *petition for cert. filed* (Jan. 20, 1987).

The Attorney General urges us to decide the merits of the case because interpretation of the Act is a question of law reviewable *de novo*. *See, e.g., Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1986).

We decline to do so. The posture of this case is the reviewal of a preliminary injunction. Neither party has had the opportunity to fully present their arguments to the district court. Also, the district court did not make a final decision on the merits. Moreover, we believe a complete factual determination needs to be made before a final decision on the merits can be made.[6] We therefore limit our review to determining whether the district court abused its discretion by concluding CSS was likely to succeed on the merits. *National Center*, 743 F.2d at 1369.

III

The IRCA changed immigration law as it historically existed in a very important respect. It gives, as a one-time only program, certain aliens the opportunity to become legalized United States citizens. The major purpose behind the Act was to increase control over illegal immigration by allowing a controlled legalization program for illegal aliens and thereby enable the INS to target its enforcement efforts on stemming the new flows of undocumented aliens into the country rather than seeking out those who had been in the United States for some length of time. *See* H.R. Rep. No. 99-682, 99th Cong., 2nd Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649-5653.

There are two provisions under the IRCA whereby aliens may become legalized. The first is contained in Section 245A. (Section 201 of the Act). Under section 245A, persons who have been in the United States illegally since January 1, 1982, may apply for legalization by acquiring

[6] Factual determinations which may need to be made include findings on the administrative burdens placed upon the INS in administering parole authorization and the impact upon aliens affected by the Attorney General's interpretation, including seasonal agricultural workers entering the United States for the season of 1987.

temporary resident status, and then, after one year, by applying for permanent residency. The second legalization provision is contained in section 210 (section 302 of the Act), which permits application for legalization for seasonal agricultural workers who have been in the United States at least 90 man-days during the 12-month period ending May 1, 1986.

To apply for temporary residence under section 245A, an alien must establish that he "resided continuously" in the United States in an unlawful status since January 1, 1982, and has maintained "continuous physical presence" since the date of enactment. Sections 245A(a)(2)(A), (a)(3)(A) and (B). An alien must establish "continuous physical presence" except for "brief, casual, and innocent" absences. Section 245A(a)(3)(C). If an alien is outside the United States, he may not be admitted into this country to apply for adjustment of status under section 245A. Section 245A(a)(3)(C).[7]

[7] In setting out the presence requirement for adjustment of status to lawful temporary residence, the Act provides in § 245A(a)(3)(A), (B) and (C):

> "(3) CONTINUOUS PHYSICAL PRESENCE SINCE ENACTMENT.—
>
> (A) IN GENERAL.—The alien must establish that the alien has been continuously physically present in the United States since the date of the enactment of this section.
>
> "(B) TREATMENT OF BRIEF, CASUAL, AND INNOCENT ABSENCES.—An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.
>
> "(C) ADMISSIONS.—Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

Similarly, to apply for temporary residence as a seasonal agricultural worker under section 210, the alien must establish that he has "resided in" the United States and worked in agricultural service during the 12-month period ending on May 1, 1986. Section 210(a)(1)(B)(i) and (ii).

What is at issue here, then, is whether the district court erred in finding CSS likely to succeed on the merits of its contention that the Act (under § 245A or § 210) allows an alien with a prima facie claim to legalization to depart from and reenter the country after November 6, 1986 without INS authorization, i.e., illegally, without destroying the "continuous physical presence" requirement. While this contention resolves the first paragraph of the TRO, because the contention also is the basis for paragraphs two and three of the TRO, we believe it necessarily resolves them as well.

The essence of this case becomes whether an illegal reentry into the United States, i.e., one made without INS parole authorization, is "brief, casual, or innocent" under section 245A(a)(3)(B). The Attorney General argues that an illegal reentry breaks the "continuous physical presence" and "resided in" requirements of section 245A and section 210. In short, he suggests an illegal reentry is not "innocent." On this basis, he argues he must exclude or deport any alien who left the country without INS parole authorization since by leaving, they forfeited the possibility of applying for legalization.

IV

We find the Attorney General's argument persuasive. Essentially, the question is one of statutory interpretation. Our starting point is the truism that Congress has plenary power to make rules for admission of aliens. *Fiallo v. Bell,*

430 U.S. 787, 792 (1977); *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972); U.S. Const. art. I, § 8, cl. 4. Such power is necessary since the sovereignty of our nation depends upon control of our borders. In this, Congress has delegated implementation of the IRCA to the Attorney General, through the INS, and it is the Executive Branch's duty to enforce the Act Congress sought to pass. *See, e.g.,* Section 245A(b)(3)(A) (directing the Attorney General to authorize travel abroad during the period of lawful temporary residency).

Where the language of a congressional statute is unclear or ambiguous, we ordinarily look to congressional intent for direction in determining the correct interpretation. *Train v. Colorado Pub. Int. Research Group,* 426 U.S. 1, 9-10 (1976). The legislative history, however, is devoid of direction as to the meaning of "brief, casual, and innocent" as Congress intended it to be used in the IRCA.[8] We must therefore consider the Attorney General's interpretation of the statute, recognizing that his interpretation, while not binding, is "entitled to great deference and should be accepted unless demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute." *Olivares v. I.N.S.,* 685 F.2d 1174, 1177 (9th Cir. 1982). Applying this standard, the legislative history, and

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[8] The House Report merely restates the language used in the Act.

> "In order to be eligible for legalization under this bill an individuals must show unlawful immigration status as of January 1, 1982, continuous residence in the United States since January 1, 1982, and compliance with most of the 33 grounds of exclusion in current law applicable to all persons seeking to come to the United States. The Committee requires the applicant to have been continuously physically present in the United States since the date of enactment except for brief, casual, and innocent absences."

H.R. Rep. No. 99-682, 99th Cong., 2nd Sess. 1, *reprinted in* U.S. Code Cong. & Admin. News 5649, at 5675-76.

the purpose behind the IRCA, we find the Attorney General's interpretation to be a reasonable construction of the statute. *Id.*

1. Consistency in Construction

First, we strive the view the language in one section of the Act consistently with other sections. *See Adams v. Howerton,* 673 F.2d 1036 (9th Cir.) *cert. denied,* 458 U.S. 1111 (1982). In doing this, we find the Attorney General has reasonably construed the Act. The purpose of the Act is to enable the INS to control the borders. *See supra,* U.S. Code Cong. & Admin News at 5649-55. For this reason, Congress did not allow aliens to present themselves at a port of entry and make a claim of or apply for legalization. *See* Section 245A(a)(3)(C). Aliens within the United States are required to apply with the Attorney General under section 245A for temporary residence. *See* Section 245A(a). Seasonal agricultural workers may apply for legalization under section 210 to the Attorney General if they are within the United States or to an appropriate consular office if they are outside the United States. *See* Section 210(b)(1)(A) and (B).

From this, it is reasonable to conclude that departure from the United States followed by unlawful reentry after enactment, could not be deemed "innocent" under section 245A(a)(3)(B). If, as the Attorney General suggests, the alien obtained authorization from the INS to leave the United States and reenter lawfully, the reentry could be considered "innocent." In short, it is reasonable to interpret the Act consistently. Congress would therefore not be expected to prohibit admission to apply for legalization while allowing unauthorized departure and illegal reentry to apply for legalization. *See* Section 245A(a)(3)(C).

2. Legislative Purpose

Second, we point out that the purpose of the IRCA is to control our borders and enable the INS to target its enforcement efforts. To do this, the INS is attempting to concentrate on stemming new flows of undocumented aliens attempting to cross the United States borders rather than ferreting out aliens in the interior who may have lived within the country for some time. *See, supra,* U.S. Code Cong. & Admin. News at 5653. The congressional purpose would be frustrated if an undocumented alien apprehended by the INS could avail himself of the potential for legalization under the IRCA by claiming that he had resided in the United States but merely departed after November 6, 1986, and was presently returning. This is particularly the case in light of the "policy" of the INS in administering the Act to allow minimal criteria for establishing prima facie eligibility for legalization, namely, a sworn affidavit by the alien that he or she meets the legalization criteria.[9]

3. Deference to the Agency

Finally, a reading of the IRCA shows that the Attorney General is directed to provide regulations in implementing section 245A with respect to residency periods, periods of absence and advance parole procedures as a result of a departure and reentry before November 6, 1986. *See* Sections 245A(g)(1), (g)(2) and (g)(3). From this, we believe

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[9] While the Attorney General represents that it is the policy of the INS to accept affidavits at face value, we point out that such a representation appears to be contrary to the mandate of the IRCA. *See, e.g.,* section 245A(g)(2)(D) (requiring documents and independent corroboration to establish continuous residence and physical presence).

the Act can reasonably be read as allowing the Attorney General to provide rules with respect to departure and reentry after November 6, 1986. *See* Section 245A(b)(3). Such a reading necessarily carries with it the proposition which the Attorney General argues here, i.e., that departure and illegal reentry (one without INS parole authorization) after November 6, 1986, is not an "innocent absence from the United States. Therefore, the opportunity to apply for legalization would be forfeited and the Attorney General could properly deport or exclude aliens entering the country without parole authorization.

V

For these reasons, we hold the district court erred in issuing the TRO. At the same time, we acknowledge that CSS has a number of arguments which are persuasive in its construction of the IRCA. Among others, these include: (1) prior judicial interpretations and their possible indirect incorporation into the Act in establishing the meaning of "innocent," (2) the fact that the Attorney General asked Congress to include explicit language within the IRCA on the meaning of "brief, casual and innocent," but Congress refused to do so, (3) the suggestion that "innocent" is determined by the purpose for the departure, not the nature of the reentry, and (4) the fact that aliens may not have notice of the parole authorization requirement and the Attorney General did not publish the INS authorization requirement and rules concerning parole authorization in the federal register.

However, while we acknowledge these arguments, we need not address them here. We only point them out to demonstrate that both the Attorney General and CSS can present reasonable arguments which support their respective interpretations of the IRCA.

In light of this, we find the district court erred in issuing the TRO. The Attorney General has presented us with a reasonable construction of the IRCA. The district court therefore abused its discretion by concluding CSS was likely to succeed on the merits.

REVERSED and REMANDED.[10]

The mandate shall issue forthwith.

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[10] The motion of CSS to supplement the record is denied. None of the material presented to us has been considered by the district court in connection with the issues raised on this appeal.

HALL, Circuit Judge, dissenting:

I do not believe that we have jurisdiction to review the temporary restraining order (TRO) entered by the district court in this case. Therefore, I respectfully dissent.

The majority treats the TRO as a "*de facto* preliminary injunction appealable under [28 U.S.C.] § 1292(a)(1)." *Ante* at 5. However, all of the Ninth Circuit cases cited in the opinion base appealability on the fact that the TRO in question effectively decided the merits of the case. Here, as the majority concedes, the TRO did not decide the merits of the case. *Id.* at 6.

In *Northern Stevedoring and Handling Corp. v. International Longshoremen's and Warehousemen's Union, Local No. 60,* 685 F.2d 344 (9th Cir. 1982), we considered whether a TRO enforcing an arbitration award was an appealable order under 28 U.S.C. § 1292(a)(1). We noted that "[w]hen a temporary restraining order *decides the merits of the case,* the appellate court will not require an appellant to go through additional proceedings for a permanent injunction." *Id.* at 347 (emphasis added). We went on to find the TRO appealable, relying on the fact that the TRO "*dispose[d] of the merits of the case.*" *Id.* (emphasis added).

Likewise, in *Graham v. Teledyne-Continental Motors,* 805 F.2d 1386, 1388 (9th Cir. 1986) (emphasis added), we held that the denial of a TRO was immediately appealable because it "*effectively decided the merits of the case*: should the NTSB and Teledyne proceed with the disassembly and inspection of the engines, appellant's claims will be rendered moot." *See also Kimball v. Commandant Twelfth Naval Dist.,* 423 F.2d 88, 90 (9th Cir. 1970) (TRO held appealable because trial judge "decided the merits of the case after hearing thorough argument by both sides").

Commentators are in agreement with our decisions. According to Wright and Miller: "The only situations in which an appeal is available from an order under Rule 65(b) is when the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the claim, thereby rendering moot the underlying request for an injunction." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2962, at 616-17 (1973) (footnotes omitted). Moreover, they note that "[t]he fact that injunctive relief is being sought is not sufficient in and of itself to bring a court order issued during the course of an action within the scope of the interlocutory appeals statute." *Id.* at 622.

The proposed opinion creates an exception to well-established rules of appealability by allowing the appeal of a TRO which does not dispose of the merits of the case. Such an unwarranted exception will only serve as an invitation to others to file premature appeals.

The majority attempts to justify its result by citing *Fernandez-Rogue v. Smith,* 671 F.2d 426 (11th Cir. 1982), and *Adams v. Vance,* 570 F.2d 950 (D.C. Cir. 1978), for the proposition that construction of a TRO as a preliminary injunction is determined by considering whether the order merely preserves the status quo or grants the relief requested. *Ante* at 5. These cases do not support the majority's conclusion that the TRO in this case is appealable. In *Fernandez-Rogue,* the court held that a TRO enjoining the Immigration and Naturalization Service (INS) from deporting aliens pending a determination of their legal rights was "intended merely to preserve the status quo in the face of the stated intention of the government to deport the appellees without notice to the court." 671 F.2d at 429. The court stated that such a TRO was "nonappealable." *Id.* at 430. Similarly, the TRO in this case merely preserves the status quo by enjoining the INS from deport-

ing aliens who are already present in this country pending a determination of their legal rights under the Immigration Reform and Control Act of 1986 (the Act). It is, therefore, nonappealable.

There are strong policy reasons for not allowing appeals from TRO's: .

> The practical reasons for not generally allowing appeals from temporary restraining orders are that (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal . . . and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts.

Connell v. Dulien Steel Products, Inc., 240 F.2d 414, 418 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958); *see also* C. Wright & A. Miller, *supra* p. 2, at § 2962. All of these factors are present here. As the majority notes, "[n]either party has had the opportunity to fully present [its] arguments to the district court." *Ante* at 6. Furthermore, the district court had scheduled a preliminary injunction hearing for December 18, 1986, well within the twenty-day period allowed by Fed. R. Civ. P. 65(b).

The majority compounds its error by applying an improper standard of review. It cites *National Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir.), *aff'd on other grounds*, 791 F.2d 1351 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3536 (U.S. Jan. 20, 1987) (No. 86-1207), for the proposition that review is limited to determining whether the district court abused its

discretion in concluding that the plaintiffs were likely to succeed on the merits. *Ante* at 6. In fact, *National Center* stands for the proposition that review is limited to determining whether the district court abused its discretion in balancing the hardships against the plaintiffs' probability of success. 743 F.2d at 1369. The majority does not undertake a balancing of the hardships as required by *National Center*. The majority is unable to balance the hardships without more facts on the administrative burdens on the INS and the impact upon the aliens of the Attorney General's interpretation of the Act. The majority's inability to balance the hardships underscores the fact that the TRO in this case should not be treated as a "*de facto* preliminary injunction."

I would dismiss the appeal for lack of jurisdiction. The district court would then be free to consider whether a preliminary injunction is in order.

CERTIFICATE OF SERVICE

CASE # Civ S-86-1343-LKK

CATHOLIC SOCIAL SERVICES

v.

MEESE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on 4-7-87 I served a copy of the attached Orders (2) by placing said copy in a postage paid envelope addressed

to the persons hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptable located in the Clerk's Office.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

v.

EDWIN MEESE, III, ETC., DEFENDANT.

[FILED MAY 3, 1988]

ORDER

In a separate order, the court has determined that 8 C.F.R. section 245a.1(f) must be held inconsistent with section 245A(a)(3) of the Immigration and Naturalization Act as amended by the Immigration Reform and Control Act of 1986 ("IRCA"). In this order, I resolve plaintiffs' motion to amend the definition of the class certified in this suit.

The following class is presently certified in this action:

> All persons prima facie eligible for legalization under INA § 245A or having nonfrivolous claims to legalization under INA § 210 who:
>
> (1) reentered or attempted to reenter the United States without inspection after the enactment of IRCA following a brief, casual, and innocent absence from the United States . . . ; or

> (2) before the enactment of IRCA, were ordered by the defendant or his agents to depart the United States on dates falling after the enactment of IRCA and have received no notice from the INS rescinding or postponing their departure dates . . . ; or
>
> (3) possess nonfrivolous claims to legalization as Special Agricultural Workers and have been or may in the future be excluded from the United States prior to the filing of a legalization application . . . ; or
>
> (4) were apprehended by the INS prior to the enactment of IRCA and have been or may in the future be denied employment authorization . . . ; or
>
> (5) have attempted or may in the future attempt to surrender to the INS for processing, release, and the issuance of employment authorization, and whom INS has or may in the future refuse to issue such work authorization. . . .

See Catholic Social Services v. Meese, 664 F. Supp. 1378, 1380 n.2 (E.D. Cal. 1987); *see also* Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Amend Complaint and Class Definition and to Add, Intervene or Join Parties, filed February 27, 1987, at 12.

Plaintiffs propose that the class definition be amended, as follows:

> (1) All persons deemed ineligible for legalization under section 254A solely on the ground that they reentered the United States without INS authorization (i.e. "advance parole") on or after November 6, 1986;

(2) All persons deemed ineligible to have their legalization applications approved in the United States under section 210 solely on the ground that they reentered or attempted to reenter the United States without INS authorization (i.e., "advance parole") on or after November 6, 1986;

(3) All persons who are eligible for legalization under either sections 245A or 210 who have been apprehended and/or detained by defendant and improperly advised of their rights under IRCA, or not advised of such rights, and thereafter expelled from the country.

The proposed definition is too vague, and sweeps too broadly. Furthermore, as to the third subclass, it is unclear whether there are any named plaintiffs to represent this class; nor is the scope of plaintiffs' claim in this regard clear to the court. Accordingly, the court will not recertify the class in accordance with plaintiffs' proposed definition. Instead, the court will certify the following class:

(1) All persons prima facie eligible for legalization under INA § 245A who departed and reentered the United States without INS authorization (i.e., "advance parole") after the enactment of IRCA following what they assert to have been a brief, casual and innocent absence from the United States; or

(2) All persons having a nonfrivolous claim to legalization under INA § 210 who reentered or attempted to reenter the United States without INS authorization (i.e., "advance parole") on or after November 6, 1986.

IT IS SO ORDERED.

DATED: May 3, 1988.

/s/ Lawrence K. Karlton

LAWRENCE K. KARLTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

CASE # Civ S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., PLAINTIFF(S),

v.

EDWIN MEESE, III, ET AL., DEFENDANT(S).

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 3 1988, I served a copy of the attached Order (2) by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptable located in the Clerk's Office.

SERVED BY INTER-OFFICE

LAWRENCE K. KARLTON. (2)
Chief Judge
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

v.

EDWIN MEESE, III, ETC., DEFENDANT.

[FILED MAY 3, 1988]

ORDER

This matter is before the court on plaintiffs' motion to amend the class definition and on cross-motions for summary judgment. Defendant has also filed a motion to dismiss plaintiffs' claims under section 210 of the Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), on the grounds that those claims are moot. In this order, I resolve the motion for summary judgment relative to plaintiffs' claim concerning applicants for legalization under section 245A of the INA, as amended by IRCA (codified at 8 U.S.C. § 1255a, hereinafter referred to as "§ 245A"). The issues regarding claims under section 210, the Administrative Procedures Act, and class certification will be resolved in separate orders.

I turn to the merits of plaintiffs' claim.[1] Plaintiffs challenge the INS' interpretation of § 245A(a)(3)[2], as manifested by its regulations implementing that section. Specifically, plaintiffs challenge the INS' interpretation of the phrase "brief, casual and innocent."

On November 14, 1986, the INS issued a nationwide telex which provided, *inter alia,* that "[a]n alien who makes an unauthorized departure and illegal reentry after [November 6, 1986] shall be considered to have broken his period of continuous physical presence and thus will be ineligible for legalization under Section 245A." Plaintiffs' Exhibit A, at 15. In the final regulations, issued May 1,

[1] Defendant has objected to the court considering the motions for summary judgment as relating to the sixth amended complaint, which was filed after the summary judgment motion. Defendant argues that the sixth amended complaint introduces a new issue and new factual circumstances, i.e., aliens who entered the country "lawfully" but without advance parole, and that he will be prejudiced if he is not given an opportunity to conduct discovery and address the issue of "lawful" entries in this context. Defendant's contention is without merit. Plaintiffs have consistently, throughout the course of this litigation, challenged the INS' interpretation of the "brief, casual and innocent" absence exception to the continuous physical presence requirement of section 245A(a)(3). The addition of new plaintiffs who entered the United States by use of a border crossing card, but without advance parole, does not change the substantive legal issue presented by the summary judgment motion.

[2] That section provides: "(3) *Continuous Physical Presence Since November 6, 1986*—*(A) In General*—The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986. (B) *Treatment of Brief, Casual and Innocent Absences*—An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual and innocent absences from the United States. (C) *Admissions*—Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

1987, the INS waived this condition for section 245A-eligible aliens who reentered the U.S. prior to May 1, 1987. 52 Fed. Reg. 16206, 16208 (1987). However, the final regulations define "brief, casual and innocent" as "a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control." *Id.* at 16208-09 (to be codified at 8 C.F.R. § 245a.1(g)). It is this interpretation of "brief, casual and innocent" as including only departures authorized pursuant to INS' advance parole procedures that is challenged here.

In order to determine whether the regulation conforms to the statute, the court must first determine the statute's meaning. Although in a previous opinion in this case, *Catholic Social Services, Inc. v. Meese*, 664 F. Supp. 1378, 1382-83 (E.D. Cal. 1987) (hereinafter "CSS"), I discussed at length relevant standards of statutory construction, it seems appropriate to delineate the appropriate method of proceeding here as well.

The task for a court confronted with a challenge to an administrative agency's construction of a statute is to ascertain congressional intent, for it is the duty of both the court and the agency to give effect to that intent. *INS v. Cordoza-Fonseca*, 480 U.S. ____, ____ n. 29i, 107 S. Ct. 1207, 1220 n. 29. "The first step of any district court in resolving a matter turning on statutory construction is to determine if there is binding authority construing the statute." *Tello v. McMahon*, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988). In the absence of such authority, the court employs a sequential process, first applying the plain meaning rule to the statutory language and then, if necessary, looking to the legislative history. *CSS* at 1383. If the statutory language is "clear and unambiguous," *id.*, the court looks to the legislative history only to determine whether there is "clearly expressed legislative intention" contrary to the plain language of the statute. *Cardoza-Fonseca*, 480 U.S. at ____ n. 12, 107 S. Ct. at 1213 n. 12.[3]

If congressional intent can be ascertained using these "traditional tools of statutory construction," the question for the court is whether the agency's regulation is "fully consistent" with that intent. *National Labor Relations Board v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. ____, ____, 98 L. Ed. 2d 429, 441 (1987). On the other hand, if the initial analysis demonstrates that the statute is silent or contains an unresolved ambiguity as to the issue tendered, the court must resort to textual aids to construction and then to extrinsic aids, including examination of the agency's interpretation. *CSS*, at 1382-83. If there is such an ambiguity, the administrative interpretation, while not conclusive, is entitled to deference if the interpretation is a linguistically possible one and is consistent with the statutory purpose. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981-82 (1986). If the administrative interpretation is "based on permissible construction of the statute," *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), it may be deferred to even if "the agency construction was [not] the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had

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[3] The plain meaning rule does not bar examination of the legislative history, *Watt v. Alaska*, 451 U.S. 259, 266 (1981), but "[v]ery strong evidence, if not explicit language, from the legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of a statute." *Tello v. McMahon*, 677 F. Supp. at 1441.

arisen in a judicial proceeding." *Id.* at 843 n. 11. Factors to be considered in weighing the degree of deference to be afforded an agency interpretation include "the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed." *United Food and Commercial Workers Union*, 98 L. Ed. 2d at 442 n.20; *see also Sierra Club v. Watt*, 608 F. Supp. 305, 331 n.48 (E.D. Cal. 1985).

Applying the steps enumerated above, I determine below that the plain meaning rule does not resolve this case. Moreover, although the legislative history does provide significant evidence of legislative intent, it is not completely dispositive. Nonetheless, as I explain, the regulation in question will not be deferred to because the phrase "brief, casual and innocent" has not been consistently interpreted by the agency, and the regulation is inconsistent with the liberal construction of the statute contemplated by Congress, is inconsistent with the historic meaning of the phrase which was likely to have been the meaning Congress intended, and overall appears to frustrate rather than implement congressional intention.

I

PLAIN MEANING

Since there is no binding construction of the statute at bar, in accordance with the sequential process, I first examine the statute's language to determine if it is dispositive. It appears to the court that application of the plain meaning rule does not provide a clear resolution of the issue tendered. The phrase "brief, casual, and innocent" is not defined in the statute itself. *See Chevron U.S.A.*, 467 U.S. at 851; *Sacramento Regional County Sanitation Dist. v. Thomas*, 688 F. Supp. 1427, 1431 (E.D.

Cal. 1987). ("[W]hen Congress defines a term in a statute, that term is plain, and application of the plain meaning rule requires that term be given its statutorily defined meaning.") Nor does the phrase have a single clearly applicable "ordinary" or "normal" meaning which is readily discernible from the words themselves. *Cf. Garcia v. United States*, 469 U.S. 70, 73 (1984). Each of the words in the phrase has a variety of meanings and the statute itself does not provide a limiting construction of either the individual words or the entire phrase.

II

LEGISLATIVE HISTORY

Given the determination above, I next turn to the legislative history. Examination of that history strongly suggests that the phrase "brief, casual, and innocent" has a historic meaning and that Congress intended to adopt that meaning when employing the phrase in IRCA. To demonstrate that proposition, it is necessary to examine the legislative history dealing with the amendments relating to suspension of deportation, since it is in that context that the meaning of the term has developed.

In section 315 of IRCA, Congress amended section 244(b) of the INA, 8 U.S.C. § 1254(b), the section governing suspension of deportation, by adding the following provision:

> (3) An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.

The legislative history of this section specifically notes that:

> The Committee Amendment relaxes the recent Supreme Court interpretation with respect to the seven years "continuous physical" residence requirement to qualify for suspension of deportation under section 244 of the Immigration and Nationality Act (*Phinpathya v. INS*, 104 S. Ct. 584 (1984). That decision held that any departure from the U.S. during the seven year period was interruptive of the residence requirement, thus making the alien ineligible for relief. This Admendment relaxes the residence requirement in the case of a "brief, casual, and innocent" departure from the U.S.

H.R. Rep. No. 682(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5682.

Congress used the same phrase in the amendment to the suspension of deportation statute as it did in section 245A.[4] "It is a well-established principle of statutory construction that 'the same words or phrases are presumed to have the same meaning when used in different parts of the statute.' " *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 703 n.11 (9th Cir. 1981), *quoting Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 725 (9th Cir. 1978); *see also Metropolitan Life Insurance Company v. Taylor*, 481 U.S. __, __, 95 L. Ed. 2d 55, 64

[4] The fact that Congress used *additional* language in the suspension of deportation context ("and did not meaningfully interrupt the continuous physical presence") is not significant for the examination undertaken here. As the legal meaning of the phrase "brief, casual and innocent" developed, it came to be used as an exposition of the circumstances under which a meaningful interruption of physical presence did not occur; *see* section IV, *infra;* thus, it is the parallel use of "brief, casual and innocent" that is instructive.

("presumption that similar language in two labor law statutes has a similar meaning . . . fully confirmed by the legislative history"). The presumption is rebutted only by a showing that "the same phrases are used in '*different* parts of the statute with manifestly different intent.' " *U.S. v. Various Slot Machines on Guam*, 658 F.2d at 703 n.11. Here, there is no evidence that Congress intended the phrase "brief, casual and innocent" to have different meanings in different sections of IRCA; indeed, the evidence is to the contrary.

That the Congress was well aware of the historic meaning of the phrase "brief, casual and innocent" it employed in both sections is reinforced elsewhere in the history. Thus in comments on use of the phrase in section 245A, John R. Bolton, Assistant Attorney General, in a letter dated June 4, 1986, to the Chairman of the House Judiciary Committee, wrote:

> The Administration also believes that the provisions relating to "brief, casual and innocent absences from the United States will be extremely difficult to administer. Application of this standard is not supported by *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). *Fleuti* applied only to lawful permanent resident aliens, not aliens illegally in the United States. We suggest that absences of a specific period of time, i.e., no more than fifteen days in the aggregate, from the date chosen for legalization, constitute the qualifying limit. The bill should also specifically state that absences related to violations of the immigration laws would automatically interrupt the physical presence requirement, regardless of the period of absence.

H.R. Rep. No. 682(I), at 116, 1986 U.S. Code Cong. & Ad. News at 5720. The comments in his letter with respect to section 244(b) are substantially similar:

> This amendment would overrule *INS v. Phinpathya,* 104 S. Ct. 584 (1984), which held that any absence, however, [sic] brief, breaks the continuity of physical presence.
>
> We oppose this amendment because its vagueness invites judicial lawmaking and encourages litigation. We recommend either deleting this provision or amending it to preclude the establishment of continuous physical presence if the alien's departure is 15 days or longer or where the alien has engaged in activities contrary to the immigration laws.

Id. at 124, 1986 U.S. Code Cong. & Ad. News at 5728.[5]

The legislative history above, while it does suggest that Congress was aware that the phrase "brief, casual and innocent" had a historic meaning, does not itself resolve the meaning of the phrase. Nonetheless, that historical context significantly aids in construing the statute because " '[w]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' " *Lorillard v. Pons,* 434 U.S. 575, 583 (1978), *quoting Standard Oil v. United States,* 221 U.S. 1, 59 (1911).

It is unclear to the court whether under the sequential method of statutory construction, the historic meaning of a term when specifically recognized in the legislative history, should be treated as legislative history or merely as an extrinsic aid to construction. Because legislative history may suffice to foreclose further analysis, the court believes that discretion is the better part of valor, and it is more appropriate to treat it as an extrinsic aid, thus insuring further analysis. By treating the historic meaning of the phrase as an extrinsic aid to construction, I thus conclude that neither application of the plain meaning rule nor examination of the legislative history is dispositive of the issue at bar. Accordingly, application of other aids to construction are required. Given my determination to treat the historic meaning of the phrase as an extrinsic aid, I will defer further exposition of that meaning to that portion of the opinion (see § IV, *infra*).

[5] The references to *Fleuti* and *Phinpathya* in the Assistant Attorney General's letter to the Committee demonstrates that the entire course of development of the phrase "brief, casual and innocent" was before the legislature since, as is described in section IV, *infra,* the doctrine was first enumerated in *Fleuti* and rejected in the suspension of deportation context in *Phinpathya.*

Before applying various extrinsic aids to resolution of the statute's meaning, however, I must now recognize that the legislative history provides very specific guidance for interpretation of the legalization program implemented by Congress in IRCA. The House Report specifically declares that:

> The Committee intends that the legalization program should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by Congress. Such implementation is necessary to insure the true resolution of the problem and to insure that the program will be a one-time-only program.

H.R. Rep. No. 682(I) at 72, 1986 U.S. Code Cong. & Ad. News at 5676.[6]

[6] The need to interpret liberally in order to insure a one-time-only program grew out of the Committee's recognition that "any equitable proposal for immigration reform must address the large population of undocumented aliens living and working in the United States, many for a long period of time. Therefore, the bill requires the Attorney General to grant legal status to those aliens who have been in the United States a substantial number of years, have developed equities

Thus, any construction of the statute requires a generous and liberal interpretation. With this admonition in mind, I now turn to determining whether this case may be resolved by deferring to the agency's interpretation as embodied in its regulations.

III

AGENCY INTERPRETATION

The final regulation defines "brief, casual and innocent" as "a departure authorized by the Service (advance parole) *subsequent to May 1, 1987* of not more than thirty (30) days for legitimate emergency or humanitarian purposes . . ." (emphasis added). 52 Fed. Reg. 16208-09 (to be codified at 8 C.F.R. § 245a.1(g)). Rather than providing a generous and liberal reading, the regulation construes the statute's reach in a very narrow manner. In that sense, it can be said that the administrative interpretation does not stand on a "permissible" basis within the meaning of *Chevron, U.S.A.*. Even if the agency's interpretation stood on firmer ground, however, I do not believe deference is appropriate under the circumstances.

First it must be noted that the regulation simply finds no support in the text of the statute. Thus, there is no basis in the statute for differentiating between "brief, casual and innocent absences" which took place prior to May 1, 1987, and those which occurred after that date. The statute provides that 245A-eligible aliens must establish that they have been continuously physically present in the United States, except for "brief, casual and innocent" absences, since November 6, 1986, the date of enactment. Sections

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here, and have abided by the laws of this country." *Id.* at 71, 1986 U.S. Code Cong. & Ad. News at 5675.

245A(a)(3)(A) & (B). Put another way, eligible aliens may have "brief, casual and innocent" absences between November 6, 1986, and the date they file their applications. While May 1, 1987 is the date the application period started, *see* § 245A(a)(1)(A), there is no statutory basis for distinguishing between "brief, casual and innocent" absences that occurred during the preapplication period (between November 6, 1986 and May 1, 1987) and those that occurred after the application period started.

Any possible reading of the Attorney General's final regulation leads to a result that is inconsistent with the Congressional purpose. If the regulation is interpreted as permitting all otherwise eligible aliens inside the United States as of May 1, 1987, to obtain legalization without consideration of absences from the United States between November 6, 1987 and May 1, 1987, the Attorney General has in effect voided the continuous physical presence requirement during the preapplication period. If, on the other hand, the regulation is interpreted literally, i.e., that an alien must establish that he has been continuously physically present in the U.S. since November 6, 1986, except for absences authorized by the INS after May 1, 1987, then it reads the "brief, casual and innocent" absence exception out of the statute entirely during the preapplication period. Neither construction of the regulation is consistent with the plain language of the statute. Under these circumstances, it is not clear that the regulation is a linguistically permissible interpretation of the statute so that deference is even possible.

The conclusion that Congress did not intend the exception to encompass only absences authorized by INS is reinforced by consideration of other provisions of the statute. Central to understanding this aspect of the congressional scheme is accepting the full implication of the fact that

this statute is a "legalization" program, i.e., that it provides rights to people who are presently in an illegal status. Given this understanding, the statute reflects congressional recognition that the legalization program might fail because of the illegal alien's natural fear of the Immigration Service. Under such circumstances, interpreting the phrase "brief, casual and innocent" to require advance parole is simply inconsistent with that congressional perception.

The section 245A legalization program extends to aliens who have resided continuously in the United States in an unlawful status since January 1, 1982. The statute provides that applications for legalization may be filed either with the Attorney General or with qualified designated entities ("QDEs"). *See* § 245A(c). The House Report explains the decision to use QDEs as part of the legalization program, as follows:

> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach serve and provides for an extensive education and outreach program prior to the application period.

H.R. Rep. No. 682(I) at 73, 1986 U.S. Code Cong. & Ad. News at 5677. The statute also has strict confidentiality provisions which prohibit the Attorney General from gaining access to QDE files and records regarding an alien's

request for assistance with the legalization process without such alien's consent. Section 245A(c)(4). These provisions are "meant to assure applicants that the legalization process is serious and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rep. No. 682(I) at 73, 1986 U.S. Code Cong. & Ad. News at 5677. This express recognition of and concern about the problem of getting undocumented aliens to come forward to participate in the program makes it highly unlikely that Congress intended to require such aliens to seek INS permission to leave the country prior to the time their legalization applications were filed.

Other aspects of IRCA also suggest that the regulation is faulty. The statute makes frequent and express references to authorization for certain activities and to advance parole throughout section 245A.[7] These provisions demonstrate that Congress knew about the process and could have written similar language into section 245A(a)(3) if it had intended to impose such a condition on the "brief, casual and innocent" absence exception to the physical residence requirement. *See, e.g., Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 614 (1944).

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[7] The Attorney General is required to authorize certain trips abroad for successful applicants during their period of temporary residency. *See* § 245A(b)(3)(A). By contrast, there is no reference to "authorization" for travel during the application period. The statute also expressly directs the Attorney General to exclude absences under a grant of advance parole from the aggregate period of time that breaks the period of continuous residence required to establish eligibility. *See* § 245A(g)(1)(A) & 2(B)(ii). Further, the Attorney General is directed to provide employment authorization to eligible aliens during both the preapplication and the application period, §§ 245A(e)(1)(B) & (2)(B), as well as during the period of temporary residence, § 245(A)(b)(3)(B).

Finally, deference is inappropriate because the Attorney General has not interpreted the phrase in a consistent manner. As noted above (*see* § II), the Assistant Attorney General, in his letter to the House Committee, fully recognized that the term "brief, casual and innocent" had a historic meaning and was being used by the Congress consistent with that meaning. As I explain in section IV, *infra*, that meaning certainly was not restricted to INS authorized departures. Thus, the Attorney General's regulation is not only inconsistent with the department's previous understanding of the language, it in effect sought to limit the meaning of the phrase, a result which Congress had rejected.

Moreover, the INS has not interpreted the phrase consistently throughout the statutory scheme. As noted above, the Congress also used the "brief, casual and innocent" language in its amendment to the suspension of deportation statute. IRCA § 315(b). In response to requests for admissions served by the plaintiffs in this litigation, the INS has admitted that "it is the policy of the INS that 'brief, casual and innocent' absences, including absences followed by reentry without inspection, do not automatically make aliens ineligible for suspension of deportation under 8 U.S.C. § 1244, as amended by IRCA section 315(b)." Plaintiffs' Exhibit PPPP; Defendant's Responses to Plaintiffs' Request for Admission, Response #6. By contrast, only absences authorized by INS are "brief, casual and innocent" for purposes of section 245A. 8 C.F.R. § 245a.1(g). As noted in section II, *supra*, there is no basis in the statute for construing the identical language in the two sections differently.

The defense argues that the determination that the INS may not deny a legalization application solely on the basis of an unauthorized absence from the country that is otherwise "brief, casual and innocent" contravenes section

245A(a) (3) (C). The court cannot agree. That section provides "[n]othing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection." The full implications of that section need not be resolved here and I do not do so. It may be that the practical effect of that section is to require denial of legalization to otherwise eligible aliens who are caught returning from a brief trip outside the United States[8], while at the same time preserving the right to legalization for those who successfully evade the INS on their return. If that is indeed the practical effect of the provision, it must be read in the context of a program to extend legalization to aliens who have been in this country unlawfully for over five years, and who Congress believed would have particular distrust of and fear of the INS because of the nature of such an existence. Whatever else this section may imply, it does not justify a regulation which, as a practical matter, itself virtually nullifies the "brief, casual and innocent" absence exception to the continuous physical presence requirement. For all the above reasons, the court simply cannot give any deference to the agency's interpretation.

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[8] Judge Lynch, of the Northern District of California, found that new regulations which require denial of parole for those aliens who apply for parole "for the sole purpose of seeking" legalization under IRCA, Amendment 15, 52 Fed. Reg. 16,194 (1987) (to be codified at 8 C.F.R. § 212.5(b)), were inapplicable to an alien whose "long-standing residence and family ties here almost certainly were his primary motivations" for requesting parole. *Gutierrez v. Ilchert*, __ F. Supp. __, slip op. at 11-12 (N.D. Cal. 1988), Plaintiffs' Exhibit QQQQ. Similarly, an alternative interpretation of section 245A(a)(3)(C) might limit the application of that section to aliens who seek admission for the express purpose of applying for legalization, as opposed to those whose purpose in returning is to rejoin their families or to return to established jobs.

IV
THE HISTORIC MEANING OF THE PHRASE

Given the court's inability to defer to the agency's view, I turn to another extrinsic aid to statutory construction, which does provide substantially more guidance in construing the phrase. As noted above, the phrase "brief, casual, and innocent" had a meaning which developed in immigration case law over a 21-year period, beginning with the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). In *Fleuti*, the Supreme Court held that a permanent resident alien who had made an afternoon trip to Mexico had not made an "entry" within the meaning of § 101(a) (13) of the INA, 8 U.S.C. § 1101(a) (13) and therefore was not excludable.[9] The Court held that such a trip, if it was "innocent, casual, and brief" was not an "intended" departure within the meaning of the statute. *Id.* at 461. The Court relied in part upon the "general purpose of Congress in enacting § 101(a) (13) to ameliorate the severe effects of the strict "entry" doctrine." *Fleuti* at 461-62. It concluded that the exception to 8 101(a) (13) was construed "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462. Factors relevant in finding such an interruption included the length of the absence, the purpose of the visit, and whether an object of the visit was to "accomplish

[9] That section provided, in relevant part, that "an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him." 8 U.S.C. § 1101(a)(13), *quoted in Fleuti*, at 452.

some object . . . contrary to some policy reflected in our immigration laws." *Id.*

The "brief, casual and innocent" absence doctrine was extended to cases involving suspension of deportation, provided for in 8 U.S.C. § 1254, in *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964). In *Wadman*, the Ninth Circuit was required to decide if a five-day absence from the United States on a vacation in Mexico was interruptive of the seven-year period of continuous physical presence in the United States necessary to obtain a suspension of deportation. The circuit found that there was no significant distinction between the concept of "entry" central to *Fleuti* and the "continuous physical presence" requirement they faced. *Id.* at 815-16. The court held that "continuous" was "no more subject to a hard and fast construction than is the term 'intended.' The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in *Fleuti*." *Id.* at 816. The court also concluded that the question was one of fact, not of law. *Id.*

For our purposes, it is not unimportant to note that the court in *Wadman* held that strict construction of section 244 was "peculiarly inappropriate" because the apparent purpose of the section was to enable the Attorney General to "ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law." *Id.* at 816-177. The court decided that a strict construction would frustrate this purpose, while a "liberal construction . . . would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship." *Id.* at 817. The similarity between the congressional purpose in section 244 as described in *Wadman* and that underlying section 245A of IRCA is quite apparent.

While the "brief, casual and innocent" doctrine as it developed was not parsed as three separate tests, *see Fleuti*, 374 U.S. at 462, the "innocent" factor most logically would appear to refer to the purpose of the absence from the United States. If that purpose was to accomplish some object which was itself contrary to a policy reflected in the immigration laws, the absence would be regarded as "meaningful." Illegal entry or reentry into the United States, however, was not, without more, the type of unlawful conduct that would neecessarily render an absence not innocent and therefore "meaningful." *See Git Foo Wong v. Immigration and Naturalization Service*, 358 F.2d 151, 153-54 (9th Cir. 1966); *see also de Gallardo v. Immigration and Naturalization Service*, 624 F.2d 85, 87 (9th Cir. 1980)[10]; *but see Heitland v. Immigration and Naturalization Service*, 551 F.2d 495, 503 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977) (using "implicitly deceptive methods to secure re-entry in the United States" was a "course of conduct directly contrary to a 'policy reflected in our immigration laws.' (citation omitted).")

Development of the "brief, casual and innocent" doctrine was halted by the Supreme Court's decision in *INS v. Phinpathya*, 464 U.S. 183 (1984). In *Phinpathya*, the Supreme Court held that the continous physical presence requirement was to be applied literally, thus overruling the long line of appellate cases which had applied the *Fleuti*

[10] The logic of the proposition appears clear to this court. Given that the question arose in a suspension of deportation context, all departures and re-entries were likely to *vel non* violate the immigration laws. Thus if the innocence aspect of the test referred solely to the propriety of departure or re-entry, it would always be resolved against the alien; however, as noted, the test was intended to relieve the alien of application of the immigration law strictissimi juris.

doctrine in the suspension of deportation context.[11] As noted above, Congress explicitly overruled *Phinpathya* when it amended the suspension of deportation statute in IRCA. The legislative history noted in section II, *supra*, plainly demonstrates that Congress intended to revive the "brief, casual and innocent" doctrine as it had developed in the case law.

My conclusion that Congress intended the phrase to be read against its historical context leads to resolution of the meaning of the term as used in section 245A. First, the question of whether an absence was brief, casual and innocent was one of fact to be resolved in a hearing, on a case-by-case basis, and thus was not subject to categorical definition by regulation. Such a result, moreover, seems consistent with recent Supreme Court evaluation of terms such as those in issue. As the high Court has recently explained, when there is some ambiguity in the terms which make up a standard, the terms "can only be given concrete meaning through a process of case-by-case adjudication." *Cardoza-Fonseca*, 480 U.S. __, 94 L. Ed. 2d 434, 458. In sum then, while the court cannot give definitive meaning to the statutory phrase outside its application to specific facts, it is possible for this court to find as a matter of law that the "brief, casual and innocent" doctrine is not prop-

[11] In *Phinpathya*, the Court observed that *Fleuti* involved a lawful alien, while the case before it involved an unlawful alien "who could have been deported even had she remained in this country." *Id.* at 194. The Court observed that "[s]uch an alien has no basis for expecting the Government to permit her to remain in the United States or to readmit her upon her return from foreign soil." *Id.* This distinction is plainly inapplicable to an interpretation of section 245A of IRCA, which by its terms applies only to aliens who have been in an unlawful status from January 1, 1982 through the date of their application in order to qualify for legalization. Section 245A(a)(2)(A).

erly limited to absences authorized by the INS.[12]

Given the requirement that the statute be construed liberally and generously, given the historic meaning of the phrase "brief, casual and innocent," given the statutory recognition of the natural reluctance illegals would feel in contacting the INS, and for all of these reasons explained above, plaintiffs' motion for summary judgement is GRANTED. The final regulation defining a "brief, casual and innocent" absence as one authorized by the INS is invalid as inconsistent with the statutory scheme and hence is unenforceable.[13]

IT IS SO ORDERED.

DATED: May 3, 1988.

/s/ Lawrence K. Karlton

LAWRENCE K. KARLTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[12] To be sure, the pre-*Phinpathya* case law concerning the "brief, casual and innocent" doctrine reflects uncertainty among the circuits as to whether the exception should be applied in the suspension of deportation context at all. *See INS v. Phinpathya*, 464 U.S. 183, 194 n.12. As noted above, there are also disagreements about how the *Fleuti* factors should be applied. Nonetheless, neither set of disagreements prevents this court from concluding as a matter of law that "brief, casual and innocent" absences are not limited to those authorized by INS. The first disagreement has been resolved by the language of IRCA itself, which reflects congressional intent to apply the doctrine in this context. The second set of disagreements are to be resolved in the case-by-case adjudication of each application, recognizing the congressional directive that the statute be given a liberal and generous application.

[13] I have previously ordered the parties to brief the issue of whether additional relief is appropriate and available. The court will consider that matter in a subsequent order.

CERTIFICATE OF SERVICE

Case No. Civ S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC., PLAINTIFF(S),

vs.

EDWIN MEESE, III, ET AL., DEFENDANT(S).

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 3, 1988, I served a copy of the attached Order (2) by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptable located in the Clerk's Office.

SERVED BY INTER-OFFICE

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Chief Judge
U.S. District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

Deposition of JANE EILEEN ARELLANO, taken on behalf of Plaintiff, at the National Center for Immigrants Rights, Inc., 256 South Occidental Boulevard, Los Angeles, California, on Friday, January 16, 1987, commencing on 10:00 A.M.

APPEARANCES:

FOR THE PLAINTIFF:
PETER A. SCHEY, ESQ.
National Center for Immigrants' Rights, Inc.
256 South Occidental Boulevard
Los Angeles, California 90057

FOR THE DEFENDANT:
ROBERT KENDALL, JR., ESQ.
U.S. Department of Justice
Civil Division
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

ALSO PRESENT:
SUSAN L. KAMLET, ESQ.
LINDA ADAMS, ESQ.
ESMERALDA CABRERA, ESQ.
ELIZABETH HACKER, ESQ.

[10] to grant someone advance parole?

A. December the 19th.

Q. And do you have a copy of those guidelines with you here today?

A. Personally, no, I don't.

MS. KAMLET: Can we go off the record?

(Off the record.)

BY MR. SCHEY:

Q. Can you recall what the factors are that agents are being advised to consider in deciding whether or not to grant advance parole, other than the fact that the person must establish prima facie eligibility for legalization.

A. We asked for a determination to be made whether there is urgent need to travel outside the United States.

Q. But what factors are the agents advised to consider in deciding whether the need to travel is an emergency?

A. We have been advising our Immigration officers to apply the same criteria to the legalization eligibility requests as we do on all other requests for advance parole, those being showing an urgent or emergent need to see an ill relative, being an immediate relative, or a death in the family, or other emergent personal reasons

* * * * *

[38] exist in that case that you have testified to earlier or could you testify from the summary in Exhibit 2?

MS. KAMLET: I would object to the question to the extent that it requires speculation on the part of the witness regarding the precise reasons for denial or grants of each of these applications.

To the extent that she must speculate whether she will be able to know the reasons for granting or denial from this exhibit, I object to the question.

BY MR. SCHEY:

Q. For example, the fifth entry on the first page of Exhibit 2 indicates that the application for advance parole was denied. It indicates that the subject's wife was receiving a hernia operation. And it further indicates that no evidence that spouse is in critical condition.

Could you explain, is it the current policy that before somebody will be given advance parole based on the illness of a spouse that their medical condition must be critical?

A. No.

Q. Are you able to tell us why this person, Manuel Gutierrez, was denied advance parole?

MS. KAMLET: I object to the question on the grounds that the reasons for denial that she has available

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

VS.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

Deposition of THOMAS E. GAINES, taken on behalf of Plaintiff, at the National Center for Immigrants Rights, Inc., 256 South Occidental Boulevard, Los Angeles, California, on Friday, January 16, 1987, commencing on 10:00 A.M.

APPEARANCES:

FOR THE PLAINTIFF:

PETER A. SCHEY, ESQ.
National Center for Immigrants' Rights, Inc.
256 South Occidental Boulevard
Los Angeles, California 90057

FOR THE DEFENDANT:

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ALSO PRESENT:

SUSAN L. KAMLET, ESQ.
LINDA ADAMS, ESQ.
ESMERALDA CABRERA, ESQ.
ELIZABETH HACKER, ESQ.

[18] by the INS District Office to compile the names of aliens in that situation and contact them and advise them that under IRCA if they are prima facie eligible for legalization they no longer need to leave the country?

A. I am not aware of any of those procedures.

Q. Are you aware that the present policy of INS nationwide is to only grant work authorization to aliens who are prima facie eligible for legalization and who are apprehended subsequent to November the 6th, 1986?

THE WITNESS: Can you read that back to me? I am getting lost.

(Question read.)

MS. CABRERA: If you know.

THE WITNESS: I don't know that.

BY MR. SCHEY:

Q. You don't know what the present policy is?

A. I know what the general policy is.

Q. But I am not asking you for a general policy, I am asking you specifically whether or not you know that the current policy in practice is to only grant work authorization to aliens who are prima facie eligible for legalization and who were apprehended after the enactment of IRCA? Are you aware of that policy?

MS. CABRERA: I am going to object to that question. I think it is misleading the deponent at this time.

[19] I think it would be more appropriate if you asked him what the policy is in the District Office at this time with respect to employment authorization.

MR. SCHEY: You are still required to answer.

THE WITNESS: The problem I am having, I don't understand how you are phrasing the question.

MR. SCHEY: Let me rephrase it.

Q. Are you aware that in the Los Angeles District Office today work authorization is not being provided to aliens who are prima facie eligible for legalization but who

had an order to show cause issued against them prior to November 6th, 1986?

MS. CABRERA: If you know.

THE WITNESS: I don't know.

BY MR. SCHEY:

Q. Are you aware that at various public meetings and press conferences INS officials in the Los Angeles District Office have urged aliens who believe that they are prima facie eligible for legalization not to contact the agency or come into the agency until on or after May of 1987?

A. Yes, I am aware of that.

Q. And how has that information been disseminated to the public, to the population of aliens who might be eligible for legalization?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

Monday, January 12, 1987

Deposition Of:

RICHARD E. NORTON

called for examination by counsel for plaintiffs, pursuant to notice, commencing at 9:20 a.m., Library Conference Room (8121), Office of Immigration Litigation, 601 D Street, Northwest, Washington, D.C., when were present on behalf of the respective parties:

APPEARANCES:

For Plaintiffs:

PETER A. SCHEY, ESQ.
National Center for Immigrants' Rights, Inc.
256 South Occidental Boulevard
Los Angeles, California 90057
(213) 388-8693

For Defendant:

ROBERT L. BOMBAUGH, ESQ.
Director, Office of Immigration Litigation
Civil Division
U.S. Department of Justice
601 D Street, NW
Washington, D.C. 20536

ALSO PRESENT:

ROBERT KENDALL, JR., ESQ.
ESMERALDA CABRERA, ESQ.

[79] advance parole program began to work for persons eligible for legalization?

A. Before answering that question, I would like to see telex number 8 again, please.

Q. Certainly. Why don't you take a look at it.

MR. SCHEY: Why don't we go off the record for two minutes.

(Off the record.)

MR. SCHEY: Okay, we are back on the record.

BY MR. SCHEY:

Q. My pending question is, has any instruction been issued to the field requiring them to report to the central office on their implementation of telex number 8?

MR. BOMBAUGH: That is a new question. That wasn't the one—

MR. SCHEY: Well, if you would deal with the new question, I would appreciate that.

THE WITNESS: Not to report, that I recall. We asked them to maintain a list and be sure that they were aware of the fact that they can apply for advance parole if they had to leave the country. But nothing [80] requiring a report.

BY MR. SCHEY:

Q. Approximately how many INS agents and Border Patrol agents are involved in the field nationwide in enforcement who would need to know the information contained in telex number 8 regarding the possible eligibility of certain otherwise deportable aliens for advance parole?

A. Our instruction was addressed to all field officers. We felt there was nobody who should go ignorant of these revisions in the teletype. We asked all officers to be aware of it.

Q. Do you know how many officers one is talking about?

A. Oh, that number certain floats around, depending on who is on duty. It is all the officers of the Border Patrol, all of the office or corps people in the district offices. It certainly adds up to what, in excess of 6,000 people, I guess, or approaches that.

Q. Do you know, given present INS management systems, approximately how long it would take for those officers to become aware of the contents of a telex like [81] telex number 8 issued on December 17, 1986? Just approximately, are we talking about a couple of days or a week, two weeks?

A. Oh, for the vast—and I underscore that word—majority of the officers to know, it would simply be a matter of virtually overnight. The telecommunications system has it out in the field within hours of its referral to our communications branch, and the immediate dissemination of that document is routine in the field. Certainly it depends on what time of the day it gets in, who is on duty and who is not, whether or not you are on annual leave. But certainly overnight the majority of officers should be aware of these contents, given the constraints of distribution to people who are on shift work and spread far afield from one end of the border to the next.

Q. Have you received any reports or can you today testify as to whether or how many persons have applied for advance parole who are prima facie eligible for legalization between November 6th and today?

A. No. To my knowledge, no inquiry has been made to polling the field offices as to how many people

* * * * *

[97] A. Yes.

Q. The next sentence indicates that an alien found concealed in a vehicle would normally be considered a border apprehension, regardless that his actual entry was not witnessed.

Are you aware of any current service policy which would mandate how far from a border an alien found concealed in a vehicle may be treated as having been apprehended at the border?

A. In my mind it is clear as to what circumstances we are describing here. How someone else may interpret it in light of other statutory language or other policy requirements, I don't know.

Q. What is your understanding, if any, of current INS policy regarding how far from a border a person found concealed in a vehicle may be treated as having been apprehended at entry? Or do you believe that this cannot be defined in terms of distance from the border?

A. The concept of being apprehended at entry is highly specific to this particular act to try to keep control of the circumstances that we are faced with on [98] the border between date of enactment and date of application.

Q. Are you aware of what the current policy is, if there is such a policy, regarding how far from the border an alien found concealed in a vehicle may be treated as having been apprehended at entry?

A. I am not sure I understand your question.

Q. Let me repeat the question.

Are you aware of what the current INS policy is in implementing IRCA regarding how far from a border an alien found concealed in a vehicle may be treated as an apprehension at the time of entry? Are you aware of any current policy on that question?

A. The only policy that I know of it as stated in the paragraph that we are discussing, item number 4, paragraph 2, which specifically states that—it is highly dependent on circumstances and the judgment of the officer on a probable cause basis as to whether or not the alien is in the process of effecting an entry. That is the only policy of which I am aware.

Q. And as I understand it, that policy, when you use the words "an officer involved in apprehending [99] somebody at entry", since those aliens are clearly dealt with in the first sentence of the second paragraph of number 4, and here, according to the memo itself, we are dealing with "other cases", I assume you understand the policy to allow certain aliens found concealed in a vehicle other than at the border to be treated as apprehensions taking place at the time of entry, is that correct?

MR. BOMBAUGH: I am going to object to the form of the question on the grounds that it is argumentative. If you understand it, you can answer it.

MR. SCHEY: Let me rephrase the question. I don't want to ask any argumentative questions.

BY MR. SCHEY:

Q. I am still trying to understand, since the first sentence of this paragraph deals with a very clear group of people, namely aliens apprehended in the act of effecting an illegal entry – the following sentences fairly clearly deal with other cases, and one of those other cases are aliens found concealed in a vehicle.

My question is, are you aware of any current [100] INS policy which would define how far from the border an alien found concealed in a vehicle may be treated as having been apprehended at entry?

MR. BOMBAUGH: I think the question has been asked and answered. But you can answer it again.

THE WITNESS: Yes, I have answered that question to the best of my knowledge and ability, that we are dealing with a circumstance that is unique – that is, the interim period between enactment and the application. And because there are away of acquiring a benefit or preventing losing the benefit by departing without acquiring permission to do so, that policy had to be provided which allowed us to contend with the exigencies that would crop

up at the borders during this six months period, and that this guidance – and this is the only area in which this policy is dealt with, to my knowledge – was provided to the field officers to that they are aware of the circumstances which would allow them to treat an alien as having been in the process of effecting an illegal entry and therefore would be ineligible for the benefits, or at least to apply for the benefits while in the States.

[101] BY MR. SCHEY:

Q. And would it be fair to state that aliens who are treated as having been apprehended at entry are not eligible to apply in the United States for legalization?

A. Again, are you asking if there are aliens who are caught in the process of effecting an entry, as defined by this policy, are then not allowed to apply for –

Q. Would it be fair to state – the policy clearly addresses two groups of aliens, as I have repeatedly pointed out. The first sentence deals with aliens apprehended in the act of effecting entry. And subsequent sentences, by their own terms, deal with who may be considered to have been apprehended at entry.

A. Right.

Q. Would it be fair to state that aliens apprehended, who are considered to have been apprehended at the time of entry, are not deemed eligible to seek legalization in the United States?

A. Yes.

[102] Q. Would it also be fair to state that they are not deemed eligible for a stay of deportation?

A. Yes, if they are in the process of effecting an entry. Or you have stated legalization, I assume you mean section 245A, potential beneficiaries. They cannot have entered subsequent to 11/6/86 and be considered eligible for the benefit.

Q. What is the current policy of INS with regards to the meaning of the term "just crossed the border," if you know?

A. I know of no further interpretation that has been applied to that statement.

Q. Are you aware of any instructions which have been issued to the field regarding releasing from detention deportable aliens currently detained by the Immigration Service or for the Immigration Service by another agency or private organization, who appear or who are prima facie eligible for legalization?

A. Released from INS custody?

Q. That is correct. Are you aware of any—

A. You weren't clear. It seemed as though you were saying people who were held by other agencies—I

U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

v.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

Washington, D.C.
Tuesday, October 13, 1987

Deposition of:

RICHARD E. NORTON

a witness, called on behalf of the Plaintiff in the above-entitled action, before Anne C. Early, a notary public in and for the District of Columbia, whose commission expires October 14, 1992, taken in the offices of the U.S. Department of Justice, Civil Division, Office of Immigration Litigation, 601 D Street, N.W., 8th Floor Conference Room, Washington, D.C. 20001, beginning at 10:35 a.m.

APPEARANCES:

On behalf of the Plaintiffs:

STEPHEN ROSENBAUM, ESQ.
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On behalf of the Defendant:

ROBERT KENDALL, JR., ESQ.
Assistant Director, Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

[17] A. That is correct.

Q. Is there anyone else you can think of who would have been involved in this policy change or the date?

A. The reason I can't say with any certainty is that the members present on the executive staff on any one particular date certainly vary with other commitments. Exactly who was present during the discussions on this issue I only vaguely recall. It was five or six months ago.

Q. This is an issue that was—

A. This was a time when many, many policies were being deliberated with a final version being reached for publication on May 1st.

Q. So, this was an issue that was, in fact, brought to the executive staff?

A. I remember the issue being discussed by the executive staff.

Q. Whose decision, ultimately, was it to change the policy?

A. It was the consensus of the executive staff.

Q. And when was that decision?

A. Shortly before May 1st or right on May 1st. It believe within a few days of May 1st it was decided to go ahead and

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. CIV S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

Washington, D.C.
Wednesday, October 14, 1987

Deposition of:

WILLIAM A. SLATTERY,

a witness, called on behalf of the Plaintiffs' counsel in the above-entitled action, before Thomas W. Olender, a notary public in and for the District of Columbia, whose commission expires April 30, 1992, taken in the offices of the U.S. Department of Justice, Office of Immigration Litigation, 601 D Street, N.W., Washington, D.C. beginning at 9:30 a.m.

APPEARANCES:

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[51] lack of a better word, as it proceeds through the organizational hierarchy.

Oftentimes it's returned to me with further directions to delete or to add or to actually change direction. So, we do have an opportunity within Legalization to say how we think something should be done.

What comes into the final decision, what factors are finally considered in terms of Service policy, we're removed from that.

Q. What kind of paperwork was generated on this particular point?

A. Paperwork that was generated on the entire rate package, no more, no less.

Q. Memos, in other words, or policy positions, proposed policy decisions?

A. I wouldn't say proposed policy decisions. When we write the regulations, we write them in an entire package and the package goes forward and then the entire package is acted upon.

Q. Other than the preliminary working draft and the proposed regulations themselves, about how many of these drafts were prepared by you or your staff on this particular point?

A. I have no idea.

On this particular point?

[52] Q. Yes.

A. I can't say on this particular point. We never pulled them out a point at a time. They normally went up in their entirety.

Q. Would you say the paperwork – that was your term from before – the paperwork on this change, as your staff worked on it, always took the form of a draft resolution; is that correct?

A. I don't know if I want to say "always took the form of a draft regulation."

In addition to draft regulations, the Service utilizes a decision memo process. And the Commissioner, again, feels very strongly about management participating in the final decisions. And he has opened up this decision memo process to any employee in the Service who wants to submit a decision memo on any area.

That decision memo is normally distributed among his management team for comment and there are regular meetings held on these decisions.

So, something reaching the higher echelon does not necessarily have to arrive through a draft reg. It could come in on its own weight with its own decision memo.

Q. In some instances, you may actually prepare some comment on a particular point, some recommendation, as opposed to proposed regulatory language; is that correct?

[53] A. That's correct.

Q. When you say "management team," would you be considered a member of the management team?

A. Yes.

Q. In other words, the management team is broader than the executive staff?

A. That's correct.

Q. Would it include all the assistant commissioners?

A. Yes.

Q. How about the deputy assistant commissioners?

A. No.

Q. So it stops at the level of assistant commissioner?

A. That's right.

Q. Now, as far as these—you call them decisional memos, was that your term?

A. Decision memos.

Q. Decision memos.

About how many decision memos were prepared by you or your staff on this particular policy change with regard to SAWs?

A. I don't know if we prepared any.

Q. I gather there were also comments received in response to the proposed rule on this particular point, were there not?

A. There were.

[54] Q. My recollection is, again, that there were one hundred thirty comments in opposition, do you recall?

A. No.

Q. Do you recall whether there were comments on this particular physical presence requirements which were distinct from the requirement for legalization applicants?

A. I recall that individuals commented on the proposed regs for Section 210. And they also commented on the proposed regs for Section 245.

I don't recall any comment that was to be applied equally. It could have came in. I did not see all the comments. I counted on my staff to identify them and to—

Q. So those one hundred thirty may have been the same people or there may have been another one hundred thirty people?

A. That's right.

Q. But your staff would have reviewed those comments. correct?

A. Yes.

Q. Can you recall what any of the broad themes were in those comments?

A. No.

Q. Other than the comments, was there anything else that composed the administrative record here with regard to this policy change for SAWs?

[55] A. I don't know everything that the executive board took into consideration.

Q. When you say "executive board," you mean executive staff?

A. The executive staff.

Q. As far as your participation, did you have any discussions with Mr. Norton on this particular point?

MS. CARTY: I would have to object to that and instruct him not to answer.

MR. ROSENBAUM: I'm not asking for the content of it, Ms. Carty, I'm just asking him whether he had a discussion with the Associate Commissioner.

MS. CARTY: Okay, as long as you make that clear. I got the impression that were you were treading on administrative decision-making processes, but that's okay.

MR. ROSENBAUM: Well, I am treading on the administrative decision-making process.

MS. CARTY: Well, improperly treading.

You can proceed.

MR. ROSENBAUM: Yes, I'll ask the question again.

BY MR. ROSENBAUM:

Q. Mr. Slattery, did you have any discussions with Mr. Norton on this particular point of the cutoff date for applications made within the U.S. for SAW applicants?

A. I can't remember a specific discussion, although

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CIV 5-86-1343-LKK

CATHOLIC SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

DEPOSITION OF IGNACIO ANDRADE CASTILLO

Taken on behalf of the Defendants at 265 South Occidental, Los Angeles, California, commencing at 9:15 A.M., on Thursday, November 19, 1987, before Mary Lu Stein, CSR No. 7470, a Notary Public of the State of California, pursuant to Stipulation.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:

UNITED FARM WORKERS OF AMERICA (AFL-CIO), UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., MEDINA, CHAVEZ, FRANCO-SOLORIO, ANDRADE, BAEZ-DE-HUERTA, JESUS DE GONZALEZ, JUAN PARTIDO, PABLO PARTIDO, MONTIJO, SANCHEZ, RODRIGUEZ-IBARRA, CANO, COLIB, CISNEROS:

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.
By: PETER A. SCHEY, ESQ.
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and

LOS ANGELES COUNTY FEDERATION OF LABOR
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FOR DEFENDANT EDWARD MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES:

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION
By: ROBERT KENDALL, JR., ESQ.
and
EILEEN A. CARTY, Attorney at Law
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

ALSO PRESENT:

HARRY PRESSER (Spanish Interpreter)

[5] A. 8/7/54.

Q. How long did you reside in Mexico?

A. I lived there approximately until I was 20.

Q. After you were 20, where did you live?

A. Until I was about 20 or 21, then I moved here.

Q. When you were 21, did you make your first entry into the United States?

A. I entered the United States first time around 1975.

Q. In 1975 where did you enter the United States?

A. Through the hills of Tijuana.

Q. Did you enter with the aid of a smuggler or someone to help you enter?

A. Yes.

Q. You did not protect yourself to go up to the border and say you wanted to enter?

A. No.

Q. So is it true to say you sneaked in?

A. Yes.

Q. On that first entry in 1975, were you alone when you sneaked in or did someone else help you?

A. I, myself, alone.

Q. Now, what did you do in 1975 after you

* * * * *

[13] Q. What happened after that?

A. They kicked me back to Mexico, to Mexicali.

Q. Do you remember what date, what month, what year we are referring to?

A. It was a year in '76. I don't remember the date, though.

Q. How long did you remain in Mexico in 1976 after you departed voluntarily?

A. Just that night. I came back the next day.

Q. You entered the United States the same way you entered the first time in 1975?

A. Yes.

Q. When was your next departure from the United States?

A. May 9 of this year, '87.

Q. Could you tell me about that departure?

A. I was playing soccer one day. From there to the soccer field, a friend of mine – we were trying to look for a friend for 45 minutes to an hour. We couldn't procure him so we returned.

Q. Where was your friend located?

A. In Tijuana.

Q. Is that in California or Mexico?

A. Yes.

Q. Did you cross the border through a border

* * * * *

[19] to depart the United States and reenter?

A. No.

Q. So to the best of your recollection and, if you know, did you think you needed permission to depart the United States on May 9?

A. I didn't know.

Q. Had you known that you needed permission, would you have attempted to obtain permission?

A. I would have tried, attempted to obtain a permit.

Q. Had you attempted prior to seek permission to leave the United States and reenter?

A. No. I didn't know that that existed.

Q. After learning of the Amnesty Program, when did you file an application?

A. I heard on the radio that for people who had departed the United States and had exited and reentered, they were giving the person a certain period of time to file the application. So I went to a notary public and filled out my application and took it down to the Immigration Department.

Q. What happened?

A. They called me in in order to grant me a work permit.

MR. SCHEY: For the record, when he was talking

* * * * *

[23] Q. You are aware that you are a plaintiff in this lawsuit?

A. Yes.

Q. Could you briefly tell me how did you become a plaintiff in this lawsuit?

A. Because I realized that I no longer qualified for the Amnesty Program because of the simple fact I left the United States after May 1 of '87 for a short departure.

Q. Who told you you didn't qualify?

A. I talked to this lady attorney. Her name is Maria Orosco. She said the fact that it was very difficult for me to go ahead with the application because I left the United States after May 1 of '87.

Q. When you departed the United States on May 9, 1987, were you aware that you might jeopardize your chances for amnesty by sneaking out and sneaking in?

A. No, I didn't know.

Q. Did you talk to anyone before going out and coming back in about your chances for amnesty if you were caught?

A. No, I didn't talk to anybody about it. I just left and went.

Q. When you departed the United States on May 9 to visit your friend in Tijuana, did you know that you were

* * * * *

[28] Mexico.

Q. Were both of you related to the same individual you were looking for?

A. He is from my home town, my home state. I wanted maybe to get news about my family from him.

Q. Who accompanied you to Mexico?

Who traveled with you to Mexico? Did you discuss your trip?

A. Right after we finished the game there, we said to each—we made the remark, "Maybe we could go over there to try and procure my friend, just to see if we can talk to him for a while."

Q. Whose idea was it to sneak across?

A. I don't remember exactly whose idea it was.

Q. But you were aware that you were sneaking across?

A. What do you exactly mean by "sneaking across"?

I don't know exactly what you mean.

Q. You were aware that you did not cross at a port of entry where the Immigration Service is located.

A. Well, yes. I suppose so.

Q. You were aware you did not try to reenter at a point of entry where the Immigration Service is located?

A. Yes.

* * * * *

[34] to him that I had left, but he said there was no problem.

Q. Did you subsequently learn that he did not put that information in the form?

A. Yes. Afterwards I read about that problem that existed. Then I got in touch with this Maria Orosco I told you about. Yes.

Q. She is helping you now in your deportation hearing?

A. Not anymore, no.

Q. Is somebody else helping you now with your deportation hearing?

A. No, nobody is. I don't know what status this whole thing is in now.

Q. Do you have a date to go back to your deportation hearing?

A. Yes.

Q. Before going to Mexico on May 9, 1987, did you hear any publicity put out by the Immigration Service or any other publicity that you could not leave the country without the permission of the INS?

A. No, I never heard anything to that effect. If I had know, I wouldn't have gone back. I wouldn't have departed.

Q. When you came back, you testified you came back through a hole in the fence; is that correct?

[35] A. Yes, the wire, the fence they have there.

Q. Were there any signs saying "DO NOT ENTER HERE" or words to that effect?

A. No. Nothing like that. It didn't say, no.

Q. Does your wife or does your wife take care of the home?

A. She works.

Q. When you left the United States on May 9, 1987, did you intend to do anything illegal in Mexico or to smuggle anything back into the United States?

A. No.

Q. Was the only purpose of your visit to meet with a friend and to get news about your family?

A. Yes.

Q. When you left the United States, how long did you think you would be gone for?

How many weeks, days or hours?

A. Just that day, and then I was thinking about coming back Sunday morning.

Q. So you did not expect to be in Mexico for more than one night; is that correct?

A. No, no more than that.

MR. SCHEY: I have no further questions.

MR. KENDALL: I have two or three on recross.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

VS.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

DEPOSITION OF MARIA de JESUS CADENA de GONZALEZ

APPEARANCES:

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Attorney for Plaintiffs

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and
MR. ROBERT KENDALL, JR.
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Washington, D.C. 20044
Attorneys for Defendant

[8] THE INTERPRETER: I don't think she understands.

Q. (By Ms. Carty) Have you gone to Mexico—have you made any visits to Mexico since May 1, 1987?

A. Only on the 9th of May, just for shopping. I just went for that.

Q. So you did depart the United States on May 9, 1987?

A. Yes.

Q. And when did you you return to the United States?

A. The 11th of May.

Q. And what was the purpose of your trip?

A. I just went to buy tortillas, soap, things like that.

Q. Now, since November—well, on all of these occasions that you have departed the United States, you have left the United States for Mexico, how did you leave the United States?

A. By the bridge.

Q. On every month indicated?

A. Yes.

Q. On each of these occasions, how would you return to the United States?

A. Well, when I entered the United States I did not have the MICA, m-i-c-a, also known as the border crossing card. It was lost. I had lost it.

Q. So, how do you enter the United States?

* * * * *

[16] Q. So you knew that you needed the permission of the Immigration and Naturalization Service to come back in?

A. I don't understand.

Q. When you returned to the United States on May 11th, you knew that you were returning illegally?

A. Yes.

Q. Okay. Now, let me understand this. From November 6th of 1986 to May 9, you took trips to Mexico and returned to the United States. Is that correct?

A. Yes.

Q. On those occasions, how did you reenter the United States?

A. With the MICA, border crossing card.

Q. Are you aware of the new immigration law which permits certain people to remain in the United States because of continuous unlawful residence seen January 1, 1982?

A. I did not know about that.

Q. You did not know about the new amnesty provision?

A. No. I only heard.

Q. Okay.

A. I only heard, but I was told that I shouldn't go there because it wasn't true and then they were going to throw me out.

Q. Let me understand your testimony. In other words, you knew about this new law that would allow you to stay in

* * * * *

[27] A. No, I didn't think anything like that.

Q. Why did you need to take your children shopping in Mexico, especially your sick child?

A. Because I'm the only one that takes care of him and I always take him with me.

Q. Why do you shop in Mexico?

A. Because I bring back tortillas and soap and things like that that I need which are cheaper over there. That's all.

MS. CARTY: Okay. Thank you.

/s/ Maria De Jesus Cadena De Gonzalez

MARIA DE JESUS CADENA DE GONZALEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No. S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., ET AL., PLAINTIFFS,

VS.

EDWIN MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, DEFENDANT.

DEPOSITION OF SOFIA BAEZ de HUERTA

APPEARANCES:

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MR. ROBERT KENDALL, JR.
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Washington, D.C. 20044
Attorneys for Defendant

[3] Q. What city and state?
A. Brownsville, Texas.
Q. How long have you lived at that address?
A. About eight years.
Q. And are you married?
A. Yes.
Q. Does your spouse live with you at that address?
A. Yes.
Q. Do you have children?
A. One, but she has already married.
Q. And only you and your spouse live at this address?
A. Yes.
Q. When did you first enter the United States?
A. Since 1979, December.
Q. And to the best of your recollection, how did you enter the United States?
A. With my local card.
Q. With your – is that a border crossing card?
A. Yes.
Q. Now, do you still have that border crossing card?
A. Yes.
Q. And have you used that border crossing card on any occasion since entering the United States?
A. Yes.
Q. And you were aware that the border crossing card did [4] not permit you live permanently in the United States?
A. Yes.
Q. And did you receive the border crossing card when you gave an address in Mexico sometime in the past? Is that correct?
A. Yes.
Q. Is it true that, based on your long time living in the United States, since 1979, that you feel that you qualify for amnesty now?

A. Because of the law that came into effect, yes.

Q. Now, you are aware of the new law?

A. I have heard it talked about.

Q. Approximately, when did you first learn of this new law, you heard talk about this new law?

A. I heard on television and through this gentleman, Mr. Pena.

Q. Approximately, to the best of your recollection, do you know the month and the year?

A. I do not recall.

Q. To the best of your recollection, your understanding, what did you perceive or have an idea that the new law could do for you?

A. Well, I can't explain that.

Q. Okay. During—you said you entered the United States [5] in 1979?

A. Yes.

Q. And since 1979, have you left the United States to visit Mexico?

A. Some, several times.

Q. And how did you reenter? Did you use that border crossing card to reenter?

A. Yes.

Q. Now, have you applied to, or have you had your representative or lawyer fill an application out for legalization under section—what we call 245, amnesty program, to the best of your recollection?

A. I made application for amnesty.

Q. And do you know when?

A. Some date in May of this year.

Q. Do you know exactly what date in May?

A. No, I don't recall at this moment.

Q. Was it before you departed the United States to visit your mother on Mother's Day, or was it after your departure?

A. First, I went to visit my mother, and then I made the application.

Q. Now, when you visited your mother, were you aware that you needed permission from the Immigration Service to depart or reenter the United States?

[6] A. No, I did not know it.

Q. Did you use your border crossing card to reenter the United States?

A. Yes.

Q. Were you—did anyone stop you from reentering the United States with your border crossing card?

A. No, no one.

Q. Did anyone question you about your border crossing card?

A. No.

Q. When you filed your application for legalization, did you tell your representative that you had a border crossing card on May 5th?

A. I don't recall having told him.

Q. Are you familiar with this lawsuit and the allegations that have been made on your behalf?

A. If I know what they are doing for my case?

Q. Okay. In essence, what—the attorney has alleged that you left the United States on May 10th, 1987, and you visited your mother in Mexico for five hours.

A. Yes.

Q. That you reentered the United States by slipping in?

A. No, not hiding in because I have my crossing card.

Q. So you did present a border crossing card and was admitted?

[7] A. Yes, sir.

Q. So you did not cross the river?

A. No.

Q. You came across the bridge?

A. I have never crossed by the river. I came across on the bridge.

Q. Who asked you to join this lawsuit?

A. When I went to see about amnesty, they told my I was not acceptable, and they told me I could appeal.

Q. Did you appeal, or have you appealed?

A. Yes.

Q. Is it true to characterize that this statement that you returned without inspection as an incorrect statement?

MR. PAGAN: I'm going to object to that as calling for a legal conclusion.

Q. (By Mr. Kendall) Did you present yourself for inspection?

MR. PAGAN: Same objection.

Q. (By Mr. Kendall) Did you come across the bridge?

A. Yes.

Q. So you know the difference between sneaking into the United States and crossing the bridge?

A. But I have never come in hiding. I have always come with my border crossing card.

Q. But were you aware that the border crossing card did [8] not give you permission to remain in the United States, to live in the United States?

A. No.

Q. But on May 10, 1987 no one questioned you about your border crossing card?

A. No, no.

Q. And you returned directly to your residence in the United States?

A. Yes.

Q. Now, are you appealing your legalization claim?

A. Yes.

Q. Have you received a denial directly from the Immigration Service saying you are not eligible for legalization? Have they told you that your application is denied?

A. No.

Q. They have or have not denied your application?

MR. PAGAN: I think maybe she needs to be asked the question again.

A. No. No one from immigration has told me that my application for amnesty has been denied.

MR. KENDALL: I have no further questions.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CIV 5-86-1343-LKK

CATHOLIC SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

DEPOSITION OF JOSE TRINIDAD MORALES

Taken on behalf of the Defendants at 265 South Occidental, Los Angeles, California, commencing at 1:45 P.M., on Thursday, November 19, 1987, before Mary Lu Stein, CSR No. 7470, a Notary Public of the State of California, pursuant to Stipulation.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:
UNITED FARM WORKERS OF AMERICA (AFL-CIO), UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., MEDINA, CHAVEZ, FRANCO-SOLORIO, ANDRADE, BAEZ-DE-HUERTA, JESUS DE GONZALEZ, JUAN PARTIDO, PABLO PARTIDO, MONTIJO, SANCHEZ, RODRIGUEZ-IBARRA, CANO, COLIB, CISNEROS:

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.
By: PETER A. SCHEY, ESQ.
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Los Angeles, California 90057

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730 S Street
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FOR AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO):

ALTSHULER & BERZON
177 Post Street, Suite 600
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FOR LA COMMUNIDAD DE SAN JUAN:

NATIONAL REFUGEE RIGHTS PROJECT
SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS
San Francisco, California 94105

[13] deportation order or something.

Q. Did they advise you you had an outstanding deportation order or something?

A. No, I don't remember whether they told me that or not.

Q. I am trying to establish how the Immigration Service became aware of you.

A. Excuse me?

Q. Did you go to their office or did they come to your job or house and pick you up?

A. I went to their office.

Q. Why did you go to their office?

A. Because the phone call that I received in which they told me they were going to give me back my money, the $1,000.

Q. Now, you had put a $1,000 bond for your deportation proceeding?

A. My prior boss put that money for me, and I paid him back because he charged me for it.

Q. Is it correct to say that you received a telephone call from Immigration Service?

A. My brother-in-law's wife received the call for me because I didn't know how to talk English.

Q. To the best of your recollection, what did your brother-in-law's wife advise you that the [14] Immigration Service stated?

A. For me to show up, that they were going to give me that $1,000.

Q. What happened when you showed up?

Did you show up?

A. Yes.

Q. Could you explain what happened next?

A. They detained me. I brought along all of my receipts, but I had been here. And they said they didn't want to accept any of that or hear about any of that.

Q. Is it correct to state that you attempted to establish that you were eligible for amnesty?

A. That is what I tried to do.

Q. You were aware of the amnesty provisions then?

A. I only knew it as of the latter times because some friends of mine had talked to me about it and had made some remarks.

Q. Why hadn't you attempted to ascertain information about amnesty before visiting the Immigration Service in February of 1987?

A. Because I really haven't ascertained this whole thing yet, that it was there. I didn't know anything about it.

Q. When did you acquire sufficient information [15] about amnesty?

MR. SCHEY: I would object on the grounds that it is vague and ambiguous, "sufficient information" to what?

MR. KENDALL: To file an application.

MR. SCHEY: Do you want to clarify the question?

MR. KENDALL: Q. Prior to February 1987, did you have a basis or belief that you were qualified for amnesty under the new Immigration law?

A. I thought that I did qualify because of what people would talk to me about that. I thought I would qualify.

Q. When you visited the Immigration Service in 1987, did you tell them that you thought you were eligible for amnesty?

A. I just told them that I thought I had enough proof; that I would remain in this country.

Q. What did they advise you, the Immigration Service?

A. That they were not interested in any such proof.

Q. Did they say why they were not interested in any such proof?

A. They didn't explain nothing to me.

Q. Did you have an attorney with you?

A. No. At that point I no longer had an

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CIV 5-86-1343-LKK

CATHOLIC SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

DEPOSITION OF DOROTEO RODRIGUEZ IBARRA

Taken on behalf of the Defendants at 265 South Occidental, Los Angeles, California, commencing at 3:40 P.M., on Thursday, November 19, 1987, before Mary Lu Stein, CSR No. 7470, a Notary Public of the State of California, pursuant to Stipulation.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:

UNITED FARM WORKERS OF AMERICA (AFL-CIO), UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., MEDINA, CHAVEZ, FRANCO-SOLORIO, ANDRADE, BAEZ-DE-HUERTA, JESUS DE GONZALEZ, JUAN PARTIDO, PABLO PARTIDO, MONTIJO, SANCHEZ, RODRIGUEZ-IBARRA, CANO, COLIB, CISNEROS:

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FOR LA COMMUNIDAD DE SAN JUAN:

NATIONAL REFUGEE RIGHTS PROJECT
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CIVIL DIVISION
By: ROBERT KENDALL, JR., ESQ.
and
EILEEN A. CARTY, Attorney at Law
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

ALSO PRESENT:

HARRY PRESSER (Spanish Interpreter)

[4] A. A year.

Q. Do you have a green card to be in the United States?

A. No.

Q. Have you ever had a green card in the United States?

A. No.

Q. When did you first enter the United States?

A. In '79.

Q. Do you remember what month?

A. June.

Q. What did you do in 1979 after you entered the United States?

A. I was working at a company where they had wood paints in Chicago, Illinois.

Q. When you first entered the United States, how did you enter?

A. Through the hills, walking on foot.

Q. Did you eventually work your way to Chicago?

A. I crossed the line, then I caught the bus.

Q. After you entered the United States in 1979, did you ever depart the United States?

A. February 18 the Immigration people apprehended me.

[5] Q. Where were you apprehended on February 1981?

A. Ventura.

Q. What were you doing in Ventura in February of 1981?

A. I was working at a restaurant.

Q. After they apprehended you, what happened?

A. I just signed the voluntary departures. Then I returned back the next day on the 19th.

Q. You voluntarily left on your own and went back to Mexico?

A. Yes.

Q. You reentered again a day or so after?

A. Yes.

Q. You used the same method of reentry?

A. Yes.

Q. What type of work did you do after you reentered in 1981?

A. Still in the restaurant in '81.

Q. Have you continually worked in the restaurant ever since you have been here?

A. No.

Q. What other type of work have you done?

A. In '82 I was working for a company. We were in the fields and picked mushrooms.

Q. How long did you pick mushrooms?

[6] A. From '82 to the present time.

Q. You are picking mushrooms now?

A. Yes, we do.

Q. Is that a mushroom farm?

A. A farm.

Q. Were you apprehended again by the Immigration Service at any later date after 1982?

A. They arrested me in '84.

Q. What did they arrest you for in 1984?

A. I was locked up in jail because of driving under the influence. They arrested me from there.

Q. What happened after they arrested you?

A. They told me if I wanted to see a judge, I could see one. And they brought me here to Los Angeles. I spent here four days.

I saw the judge, and the judge put out a bond for me for $1,000.

Q. Now, was that an Immigration judge?

A. Yes.

Q. Pursuant to an Immigration bond that was placed on you for $1,000, were you supposed to report back for a hearing?

A. Yes.

Q. Did you ever report back for that hearing?

A. Yes.

[7] Q. What happened at this hearing?

A. The hearing took place July 10, 1986. The judge ordered me that I have to go back to Mexico in order to be able to deliver that money for the bond that he put out for me. Within six months the bond was put out. So that would have been January.

It took me about four days to leave this place because I had a minor accident, and I didn't have insurance. So I wasn't able to leave the country on the date that he ordered.

So I told the person who put out the bond for me to get in touch with Immigration to explain to them my case, why I couldn't leave. Then she told me according to the Immigration, they would come pick me up from my place of detention any time from my day of being released to throw me back to Mexico. So she talked to me. So I myself, when I left the place of detention where I was in, I myself went to Mexico.

We left—I went there, but I didn't have any I.D. with me from the line because I didn't have any I.D. with me. They didn't want to accept the sheet of paper that the judge had given to me. They accepted. They asked for I.D. I think fingerprints are enough.

The paper, the sheet of paper had my fingerprints on it. They told me it wasn't enough, that I [8] needed an I.D. with a picture.

I didn't have my license with me anymore because they had rescinded it because I didn't have insurance. I went

back to Ventura after that. I found an expired driver's license I had had, then I had some problems with my employer. They laid me off for about a month and a half. I couldn't leave again to go to Mexico even though I had the I.D. with me at that point. For that purpose, I couldn't go because I didn't have a job anymore. I had to do odd jobs here and there to support my family.

Then when I went back to a full-time basis, I went back to Tijuana to deliver that paper there. Before I went to Tijuana, I came to Los Angeles and talked to an Immigration officer here to see if I was under an order of deportation. The officer told me I was under no order of deportation. I could leave any time I wanted to drop that paper over there.

So a week after that that I was in L.A., I went to Tijuana to give them that paper there. Then when I got to the line there, I gave them the paper and everything. I tried to talk to the Immigration officer there to tell them that I thought I qualified for amnesty.

The only thing the Immigration officer told me, "Here is the door. Go back to Mexico." That is what I did. I went through the door and went back to Mexico.

[9] MR. SCHEY: Off the record.

(Discussion held off the record.)

MR. KENDALL: Back on the record.

Q. The first question is that you were picked up by the Immigration Service, the first time in February 1981. Is that true?

A. Yes.

Q. You were given voluntary departure, and you departed to Tijuana?

A. Yes.

Q. You returned to the United States two days later?

A. Well, on the 19th.

Q. On or about two days?

A. Yes, a couple of days.

Q. After returning to the United States, you began working at the mushroom factory?

A. No. In '81 I went back to the restaurant.

Q. After you left the restaurant, you started working in the mushroom farm, your present place of employment?

MR. SCHEY: Wait. He said, "No."

THE WITNESS: I have always kept on working with the mushrooms except when the plant had stopped for 15 [10] days or so. Then I did odd jobs for those two weeks. And I worked at the same place.

MR. KENDALL:

Q. Again, in 1984 you were apprehended by the Immigration Service; is that correct?

A. Yes.

Q. You were placed in deportation proceedings before an Immigration judge?

A. Yes.

Q. You were found to be deportable, but you were granted until July 10, 1986 to depart the United States; is that correct?

A. The hearing was on July 10, 1986. Then I was given an extension of six months, I believe, to January 10 of the following year, he set it of this year.

Q. Your hearing was on July 10, 1986, and you were given six months voluntary departure time in which to leave without being deported; is that correct?

A. Yes.

Q. You did not leave by January 10, 1987; is that correct?

A. I wasn't able to leave.

Q. What did you do after January 10?

Did you go to the Immigration Service and advise them as to the reason why you could not leave?

* * * * *

[14] A. Yes. On my way to Tijuana going back, yes.

Q. Now, did you do that?

A. Yes, I did.

Q. Between January 17 and the time you departed for Tijuana, did you ask any Immigration officer whether you qualified for amnesty?

A. I tried to ask the officers that I gave the paper to at the border. The officer just said, "Here is the door. Here is Mexico."

Q. Do you recall what you asked the officer at the border there?

Was that at San Ysidro?

A. In San Ysidro. Right when I give him the piece of paper, he give me fingerprints. I was fingerprinted.

He told me the following:

"This is all."

Then I said, "No, I want to ask you something," but he didn't give me a chance to.

That is when he told me, "Here is the door to Mexico."

Q. So you didn't ask him about amnesty?

A. I didn't ask anything. I didn't have time to ask for anything. Nobody answered.

Q. Now, you returned to the United States

* * * * *

[18] then they started fingerprinting me. Once we finished, I was about to explain the case to the officer to ask if I was eligible for the Amnesty Program. But the only think he asked, he said, "That is all. This is the door to Mexico."

Q. So you didn't really insist about questioning him about that?

A. No.

There was a lot of people around. They didn't pay attention to me.

Q. After you departed the line, you went directly to Tijuana?

A. Yes.

Q. How long did you remain in Tijuana?

A. Just one night. That is all.

Q. How did you reenter the United States?

A. Illegally through the hills.

Q. That was on or about May 17 or 18?

A. Yes.

Q. Of 1987?

A. Yes.

Q. Is it correct to state that at no time have you asked any Immigration official in Los Angeles or at the line whether you were eligible for amnesty?

A. I didn't ask in Los Angeles. I just asked in Los Angeles about that problem with the piece of paper [19] I had. That is what I wanted to know. I wanted to deliver the paper, and I tried to really ask them when I delivered the paper at the line, you see. And then they didn't pay attention to me.

Q. Are you aware that you are a plaintiff in the lawsuit which is captioned Catholic Social Services, Inc., vs. Meese, III, Attorney General of the United States?

A. Yes.

Q. Do you know why you are in the lawsuit?

A. I think because they didn't show any respect to me because they didn't pay attention to me.

Q. Who didn't pay any attention to you?

A. The officer at the border when I tried to explain to him that I was eligible for amnesty.

Q. But you never did ask; is that correct?

A. I didn't ask because he didn't give me a chance.

Q. When you returned to the United States subsequently the next day, in fact you did report to the Immigration Service and asked for information on amnesty?

A. No.

Q. Have you sought any information on amnesty as of this date?

A. Yes, I have sought information about amnesty.

[20] Q. Have you filed an application to the best of your knowledge?

A. Yes, I have filed an application.

Q. Do you know whether your application has been filed as a special Agricultural (SAW) Status?

A. Yes.

Q. Do you know what is the status of your application?

A. I don't know anything.

MR. KENDALL: I have no further questions.

MR. SCHEY: I have a couple of questions, just very short.

EXAMINATION

BY MR. SCHEY:

Q. Is it correct that you have been living in the United States in an unlawful status continuously since 1979?

A. Yes.

Q. Have you ever had any criminal convictions?

A. No.

Q. Have you ever received welfare?

A. No.

Q. Have you ever fradulently or falsely applied for a visa?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CIV 5-86-1343-LKK

CATHOLIC SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

DEPOSITION OF SANTIAGO COLIN FEREGRINO

Taken on behalf of the Defendants at 265 South Occidental, Los Angeles, California, commencing at 3:05 P.M., on Thursday, November 19, 1987, before Mary Lu Stein, CSR No. 7470, a Notary Public of the State of California, pursuant to Stipulation.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:

UNITED FARM WORKERS OF AMERICA (AFL-CIO), UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., MEDINA, CHAVEZ, FRANCO-SOLORIO, ANDRADE, BAEZ-DE-HUERTA, JESUS DE GONZALEZ, JUAN PARTIDO, PABLO PARTIDO, MONTIJO, SANCHEZ, RODRIGUEZ-IBARRA, CANO, COLIB, CISNEROS:

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.
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FOR LA COMMUNIDAD DE SAN JUAN:

NATIONAL REFUGEE RIGHTS PROJECT
SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS
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FOR DEFENDANT EDWARD MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES:

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION
By: ROBERT KENDALL, JR., ESQ.
and
EILEEN A. CARTY, Attorney at Law
P.O. Box 878
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Washington, D.C. 20044

ALSO PRESENT:

HARRY PRESSER (Spanish Interpreter)

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(No exhibits offered.)

[5] A. 167 Thomas Avenue, Oxnard, California.
Q. How long have you lived there?
A. Since '83 to the present.
Q. Are you married?
A. No, I am not.
Q. When did you first enter the United States?
A. October of '81.
Q. Where did you enter the United States for the first time?
A. The airport.
Q. Which airport?
A. In Tijuana.
Q. Where did you land?
A. Well, actually, you see, I came by bus, but I entered through the airport. You can go through there on foot across.
Q. So you entered the United States on foot?
A. Yes.
Q. Did you present yourself for inspection by an Immigration and Naturalization Service official?
A. When I came here? No.
Q. So when you entered through the airport, you snuck into the United States?
A. Yes. Snuck in.
Q. Do you remember the exact date of that

* * * * *

[10] bothered us before or anything, we didn't feel we had to hurry.

MR. SCHEY: Off the record for a minute.

(Discussion held off the record.)

MS. CARTY: Q. Have you filed an application for amnesty?

A. No. I was about to file it, but the whole problem that has arisen, I haven't filed it yet.

Q. Will you file it?

A. Yes, if I am allowed to. Yes.

MR. KENDALL: Off the record for a minute.

(Discussion held off the record.)

MS. CARTY: Q. In October of 1987 when you were apprehended and deported, were you aware that you were possibly eligible for amnesty?

A. I thought I was. That is the reason I asked my boss.

Q. Did you tell the people at the INS that you believed at that time that you were eligible for amnesty?

A. When they asked me. I was waiting for this letter from my boss so I could start getting my papers. They didn't hear or give me any explanations or anything. They just put down I had come here in '85. They didn't allow me any explanations.

They they told us we could not qualify through that job; only through getting married could we qualify.

Q. Did the Immigration officials advise you that you were not eligible?

A. Yes.

Q. Has anyone else told you that you were not eligible for amnesty?

A. Nobody else; in other words, I haven't really been to anybody that works in this field to assess me.

Q. Do you intend to do that?

A. We are working, an attorney that is dealing with this. I think they could give you a work permit for three years or so and also maybe he works for filing application for people for this program.

MS. CARTY: I don't have any further questions.

MR. SCHEY: I have a few questions.

EXAMINATION

BY MR. SCHEY:

Q. When you were apprehended by the Immigration in October 1987, did they tell you anything about whether you could apply for amnesty outside of the United States in Mexico?

[12] A. That I could do it in Mexico. They have a consulate in Mexico that could do it there.

Q. Did they refer you to the U.S. Consulate in Mexico?

A. Yes, the U.S. Consulate in Mexico.

Q. When you were in Mexico, did you find out that you could not do that?

A. I didn't even go to the consulate. We came back here right away.

Q. Did you talk to anybody in Mexico about whether it was possible for you to apply for amnesty in Mexico, or did anybody down there tell you anything about that?

A. No. Afterwards I asked the lady here that was going to make the application for us. She said that was not true; it was a big lie.

Q. Did they tell you any other rights that you have when you were apprehended and detained by the INS?

A. No, they didn't tell me anything.

Q. When they asked you to sign the voluntary departure form, tell us exactly what they said or what they did.

A. They asked me everything, my name and that kind of thing. And then the last thing they give you was a sheet of paper. They told me to sign here. They told us [13] if we signed the departure, it wouldn't affect our cases; that we could still return and file our application for amnesty.

Q. Do you remember on that form that they gave you to sign, did they point to a particular place where they wanted you to sign?

A. Yes, like this on the lower part (indicating).

Q. Do you have any criminal convictions in a criminal court?

A. They got me once while driving.
Q. Got you for what?
A. One of my blinker lights wasn't working.
Q. Other than that traffic violation, have you ever had a criminal conviction?
A. No, nobody, nothing.
Q. Have you ever received welfare?
A. No.
Q. Have you ever fraudulently applied or obtained a visa?
A. No, nothing like that.
Q. Since coming to the United States, have you ever departed for more than 35 days?
A. No.
Q. Have you ever made a fraudulent or false statement to enter the United States?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CIV 5-86-1343-LKK

CATHOLIC SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL., PLAINTIFFS,

vs.

EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

DEPOSITION OF UVALDO FRANCO SOLORIO

Taken on behalf of the Defendants at 265 South Occidental, Los Angeles, California, commencing at 11:00 A.M., on Thursday, November 19, 1987, before Mary Lu Stein, CSR No. 7470, a Notary Public of the State of California, pursuant to Stipulation.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:
UNITED FARM WORKERS OF AMERICA (AFL-CIO), UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION, NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., MEDINA, CHAVEZ, FRANCO-SOLORIO, ANDRADE, BAEZ-DE-HUERTA, JESUS DE GONZALEZ, JUAN PARTIDO, PABLO PARTIDO, MONTIJO, SANCHEZ, RODRIGUEZ-IBARRA, CANO, COLIB, CISNEROS:

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.
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and

LOS ANGELES COUNTY FEDERATION OF LABOR
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FOR DEFENDANT EDWARD MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES:

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION
By: ROBERT KENDALL, JR., ESQ.
and
EILEEN A. CARTY, Attorney at Law
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

ALSO PRESENT:

HARRY PRESSER (Spanish Interpreter)

[5] A. On 37th Street.
Q. Los Angeles?
A. Los Angeles.
Q. Where did you reside before you came to Los Angeles?
A. Guadalajara, the State of Jalisco.
Q. How old are you?
A. 30 years old.
Q. What is your place of birth?
A. State of Jalisco, Mexico.
Q. Your date of birth?
A. 8/3/57.
Q. Are you married or single?
A. I am married.
Q. What is the name of your spouse, please?
A. Monica Lupina de Franco.
Q. Does she reside with you at your current address?
A. Yes.
Q. Do you have any children?
A. Yes.
Q. How many?
A. Three.
Q. What are their ages?
A. The ones here in Los Angeles or the ones in [6] Mexico? Have two here and one in Mexico.
Q. How many children do you have here?
A. Born here?
Q. Born here or residing here.
A. Three that are living with me.
Q. These three, are they citizens of the United States?
A. Just two of them are.
Q. Do you have children in Mexico also?
A. One.
Q. Is that a citizen of Mexico?

A. Well, he is from Mexico, but he is living here with me.
Q. The three children include one citizen of Mexico and two United States citizens?
A. Right, yes.
Q. What is the age of the child who was born in Mexico?
A. Nine years old.
Q. The children born in the United States?
A. Seven and three.
Q. When and where were you married?
A. I was married in a church ceremony in Mexico. I don't quite remember the date, though. I was married here civilly by the civil authorities.
[7] Q. Have you had only one marriage or more than one marriage?
A. Just one.
Q. So it is two ceremonies with the same person?
A. Yes.
(Whereupon Mr. Kendall enters the deposition proceedings.)
MS. CARTY: Q. When did you first enter the United States?
A. '79.
Q. Where did you first enter the United States?
A. Through the hills.
Q. Do you remember the month or the day of your first entry into the United States?
A. Around May of '79.
Q. How did you enter the United States? Did you have a visa?
A. Through the hills.
Q. Did you enter with the assistance of a smuggler?
A. Yes.

Q. Did you have to pay that person?
A. Yes.
Q. Who entered the United States with you in

* * * * *

[14] MR. SCHEY: Just for the record, even though I conferred with the deponent, I think it is clear that he was just confused as to his reentry date. Since he was apprehended on Saturday night, and that is a matter of record, it is obvious that he returned late that evening on Sunday night.

In fact, he was in line in detention on Sunday night, and he had been in detention Saturday.

MS. CARTY: Q. Now, what did you do from 7:00 P.M. on Saturday until 11:00 P.M. on Saturday in Mexico?

A. We didn't last there for four hours. We left here at 7:00 to Tijuana.

MR. SCHEY: For the record, when he says "here," can you clarify your question about that since the record wouldn't be clear?

MS. CARTY: Q. What do you mean by you left from "here" at 7:00 P.M.?

A. Los Angeles.
Q. How long did you spend in Mexico?
A. 45 minutes to an hour more or less.
Q. What did you do during that hour?
A. We were looking for the address of this friend of ours.
Q. What is your friend's name?
A. I don't remember exactly.
Q. What happened then?

* * * * *

[39] Q. Have you lived continuously in the United States since approximately May 1979?

A. Yes.

Q. When you were interviewed on your application for legalization, did the INS person interviewing you give you any indication one way or the other whether they were going to recommend that your application be approved or denied?

A. Yes.
Q. What indication did they give you?
A. Deportation.
Q. Why was that?
A. Because we departed the United States in '87.
Q. Is that in May of 1987?
A. May of '87.

Q. Before you went to Mexico in May of 1987, had you heard any publicity that would list your rights to legalization if you left and came back without inspection?

A. No, never.

Q. If you were required to leave the United States or if you were deported from the United States what hardship would that cause to you or your family members?

A. Our separation from each other. I would have to be separated from my family.

Q. Do you currently support your children?
[40] A. Yes.

Q. What is your understanding what your prospects would be for employment in Mexico if you were deported?

A. It would be very difficult. I don't really think I could find beneficial work there.

Q. Would it, therefore, become difficult to support your family?

A. In Mexico it would be extremely difficult.

Q. Have your United States citizen children lived in the United States all of their lives?

A. Yes.
Q. Did they attend school here in the United States?
A. Yes, they are still in school.
Q. Does your wife and one child, or do you believe that your wife and one child who was born in Mexico qualify for legalization or amnesty?
A. Yes, they do qualify.
MR. SCHEY: I have no further questions.
MS. CARTY: I just have a few questions.

EXAMINATION

BY MS. CARTY:
Q. When the INS apprehended you after you came

DECLARATION OF ALFONSO LARA YANEZ

I, Alfonso Lara Yanez, depose and say:

1. I am a citizen of Mexico and have resided continuously and unlawfully in the United States since January 1971.

2. I have had no criminal convictions in the United States or Mexico, have never received public assistance, and have never obtained a visa by fraud. Since January 1971 I have never been outside of the United States for longer than about 30 days and have not been absent for a total of 185 days or more. I am informed and believe that I qualify for legalization as a result of my unlawful residence in this country since January 1981.

3. On or about May 7, 1987, I departed the United States and entered Mexico to celebre Mothers Day with my mother. I travelled with Eulalio Gonzalez Yanez, a cousin who I live with in Los Angeles. My mother lives in Pachuca, State of Hidalgo; Mexico. We returned without inspection on or about May 17, 1987, near Tijuana, Mexico.

4. I did not know at the time that I departed that my absence would make me ineligible for legaliation. Had I known this, I would not have left.

5. After my return I read in the Spanish press various articles dealing with the amnesty program. I read articles in which INS officials were quoted as saying that people who left and returned without inspection after May 1, 1987 were ineligible for amnesty. To confirm this I visited the offices of Catholic Charities on Ninth Street in Los Angeles, which was handling amnesty applications, and was advised that my absence from May 7 to May 10th made me ineligible for legalization.

6. Relying on the information I had read in the newspapers, confirmed by my visit to Catholic Charities in

Los Angeles, I did not apply for legalization on or before May 4, 1988. I believed that it would be a waste of money for me to apply because the INS took the position that I was ineligible.

7. I visited the offices of Hermandad Mexicana Nacional in Los Angeles on May 26, 1988, and was advised that a court had issued a decision a few days before May 4, 1988 changing the INS policy and allowing people in my situation to be considered for amnesty. This was the first time that I learned that I might qualify for legalization.

8. I wish to apply for legalization and believe that I qualify but for the fact that I did not apply on or before May 4, 1988.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 26th day of May, 1988, in the City and County of Los Angeles, State of California.

/s/ Alfonso Lara Yanez
ALFONSO LARA YANEZ

DECLARATION OF TRANSLATION

I, Jacqueline Ligua, depose and say:

DECLARATION OF RAOUL AROZ

I, Raoul Aroz, depose and say:

1. I am employed by Catholic Charities of Los Angeles (hereinafter "Catholic Charities"). I previously served as the Director of Operations for the Legalization Program, and currently serve as Legislative Analyst. Catholic Charities is a Qualified Designated Entity (QDE) with a contract with the INS to screen and process legalization applications. Catholic Charities serves the tri-county area of Los Angeles, Ventura, and Santa Barbara.

2. In my capacity as Director of Operations for legalization, I closely monitored INS' implementation of the legalization program, and Catholic Charities' screening and processing functions. Catholic Charities provided legalization screening and/or processing assistance to over 300,000 potential applicants and has filed over 30,000 applications with the INS. I have attended numerous meetings and training sessions on legalization. The information provided below is based upon my experience described above.

4. I am aware of the issues peresented in the *Catholic Social Services v. Meese* litigation and the injunction issued by the court on April 22, 1988.

5. Until the issuance of the court's April 22, 1988 injunction, the INS adopted the position and advised QDEs, other non-profits, and the immigrant community that potential applicants who briefly departed the United States after the agency's last-date-of-reentry rules were ineligible for legalization. As to Special Agricultural Workers (hereinafter "SAWs"), INS adopted and publicized the position that reentries after the agency's last-date-of-reentry rules terminated the applicant's right to apply in the United States. QDEs, including Catholic Charities, recommended to many applicants that they not file legalization applications because they were deemed

statutorily ineligible by the INS. Article IV, paragraph 3.2 of the Cooperative Agreement between the QDEs and the INS requires staff of QDEs to comply with all INS regulations relating to the legalization program. Many *CSS v. Meese* class members, numbering in the hundreds or thousands, remain in the country but failed to file their legalization applications because they were advised by the INS, or a QDE under contrct with the INS, that they did not qualify as a result of reentries after INS' various last-date-of-reentry rules, and they did not want to waste the filing fees and costs associated with filing an application. To the best of my knowledge the INS not yet even notified the local Legalization Offices of the court's ruling, and the vast majority of QDEs, non-profits and class members remain unaware of the court order. During the final days of the application period Catholic Charities and other QDEs are being flooded with applications. The resources of these organizations is being dedicated to completing these applications on or before May 4, 1988, and the organizations therefore do not have the resources to widely publicize the court's April 22, 1988 ruling. Because their resources are stretched so thin, the QDEs are not in a position to handle a last minute rush by *CSS v. Meese* class members. Unless the court orders an outreach effort by the INS on the change in policy, and an extension of the application period, many class members will never benefit from the legaliation program or the court's injunction.

6. Many of the class members have departed the United States because they were led to believe that they were inelgible for legalization by the INS. Others were apprehended by the INS while attempting to return to the United States other than on INS advance parole and thereafter, while still in INS custody, signed "voluntary departure" forms (INS form I-274) because they were deemed ineligible for legalization and were led to believe

they had no right to remain in the U.S. Thousands of class members have departed or been expelled from the United States solely because of reentries after INS' various last-date-of-reentry rules. To the best of my knowledge, even though SAWs come from many countries, the only sites at which applications can be filed abroad are located in Mexico. SAWs from other countries improperly expelled by the INS must now make their way into Mexico to apply for SAW status abroad. However, the Mexican government has not granted permission for SAWs to enter their country to apply for SAW status. Class members expelled from the U.S. will never benefit from the legaliation program if they are not permitted to return to the U.S. and to file their applications after May 4, 1988.

7. In many cases class members apprehended by the INS refued to sign "voluntary departure" forms and Orders to Show Cause ("OSCs") were issued against them initiating deportation proceedings. IRCA and INS' regulations require that such persons must file their legalization applications within thirty days of the issuance of the OSC. Many class members failed to file legalization applications within 30 days of the issuance of the OSC because they were led to believe that they were ineligible for legalization as a result of INS' various last-date-of-reentry regulations. Well over one hundred class members fall in this category. These class members will never benefit from the legalization program if they are not provided notice and permitted to file their applications after May 4, 1988.

8. Rather than informing legalization applicants and potential applicants seeking "advance parole" that the information they provided would be confidential (as part of their legalization application), they were administered "Miranda warnings" and advised that their statements would be used against them in future administrative and/or criminal proceedings. This policy discouraged ap-

plicants from seeking advance parole to depart the country. Advance parole was also denied to aplicants unless they could establish through documentary evidence that they needed to travel for family emergency reasons. In order to identify and provide a remedy to class members who were denied advance parole, the INS should be required to review its records, identify, and notify such class members of their right to apply for legalization even if they departed the country and returned after being denied advance parole.

9. Class members who were improperly expelled from the country under voluntary-departure at government expense, or under deportation orders, will continue to be discouraged from filing their applications if they are now required to file waivers of excludability. The INS requires legaliation applications to be accompanied by separate applications for waivers of excludability (with an additional $35 filing fee) if the applicants was previously deported or removed under volantary departure at government expense.

10. The INS has recommended denial or denied many applications filed by class members solely on the basis of 8 C.F.R. section 245a.1(g). Many such class members are not represented by counsel. Others are represented by QDEs and non-profits with limited resources and ability to pursue administrative appeals. Many of these class members will never benefit from the court's injunction unless the INS is required to identify such cases, notify the class members and the DQEs or non-profits which prepared their applications, reopen cases in which denials have been issued, and remand cases in which denials have been recommended.

11. As a number of class members have moved without advising the INS of their new addresses, whatever individual notice is required by the court should be provid-

ed to both the applicant at his/her last known address, as well as the QDE or non-profit which prepared the application for filing.

12. In fashioning its remedies in this case, the court should be aware that the majority of legalization applicants filed or attempted to file their applications without the assistance of a QDE or non-profit. The majority of applicants are basically unfamiliar with their rights under the IRCA and have heavily relied upon information disseminated through the media and at community meetings by the INS, or information provided by QDEs and other non-profits during community and training meetings. Most applicants speak Spanish or Asian languages rather than English, and the majority of applicants have little formal education.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 2nd day of May, 1988, in the City of Los Angeles, State of California.

/s/ Raoul Aroz

RAOUL AROZ

DECLARATION OF AURORA TABANICO

I, AURORA TABANICO, declare as follows:

1. My name is AURORA TABANICO and I live with my husband, FELIPE TABANICO, at 861 20th Street, Douglas, Arizona 85607.

2. ROBERTO MALDONADO, born July 27, 1979, is my nephew (his mother is my sister). ROBERTO has lived with my husband and me in Douglas, Arizona, since December 1, 1979.

3. ROBERTO has lived with my husband and me continuously since December 1, 1979. We became his legal guardians on September 9, 1985, in the Superior Court of Cochise County, Arizona.

4. On November 8, 1987, my husband and ROBERTO went to Agua Prieta, Sonora, Mexico, to get haircuts. Agua Prieta is right across the border from Douglas, Arizona. The barber shop was closed so my husband and ROBERTO went to visit relatives in Agua Prieta before coming back to Douglas.

5. At approximately 9:00 p.m. on Sunday, November 8, 1987, my husband and ROBERTO arrived at the Port of Entry in Douglas, Arizona. My husband is a lawful permanent resident of the United States and showed the inspector his card. My husband then showed the inspector a local border crossing issued to ROBERTO's mother which listed ROBERTO on it.

6. The Immigration Inspector questioned my husband and ROBERTO. My husband told the inspector that ROBERTO lives with us in Douglas, Arizona. The inspector pulled the local border crossing card and refused to allow ROBERTO to enter the United States.

7. ROBERTO MALDONADO is eligible for legalization under the Immigration Reform and Control Act of 1986. He has lived continuously in the United

States for more than 180 days since January 1, 1982, and he does not have a criminal record.

8. ROBERTO MALDONADO has lived with my husband and me since he was three months old. He is now in the second grade at the Douglas Public Schools. He has never lived in Mexico. We are raising him as our son. ROBERTO intends to apply for legalization under the terms of the Immigration Reform and Control Act of 1986. His application is now being prepared. Except for the crossing into Mexico on November 8, 1987, ROBERTO meets all of the requirements of the law for legalization under IRCA.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Douglas, Arizona, on this 23rd day of November, 1987.

/s/ Aurora Tabanico

AURORA TABANICO

DECLARATION OF CARMEN TORRES

I, CARMEN TORRES, do declare

1. I ws born on August 24, 1940 in Guanajuato, Mexico. I currently live in San Pablo, California. I originally entered the United States in September 1975, at San Ysidro, California without inspection.

2. I am applying for Status as a Temporary Resident through the Immigration Reform and Control Act (IRCA) by virtue of the fact that I entered the United States without permission prior to January 1, 1982.

3. I have eight children and a husband who live with or near me in the United States. Two of my children are U.S. Citizens. All of my other children and my husband will be applying for legalization status.

4. I have been advised that I am eligible for legalization, except for the incident described below. I have lived in the United States since before January 1, 1982. I have not received government benefits and will not do so in the future. I did have one departure from the United States in September 1985 when I went to see my sick father in Mexico. I had already made plans to return to my home in Richmond, California, after a few weeks, when suddenly on November 8, 1985 I became ill and had to have emergency surgery on my kidney. I was unable to travel and ended up staying nine months in Mexico. I have been told that this should not be a hindrance in my application for legalization, as I can supply proof that I was seriously ill and that I could not travel.

5. During the week of June 14 to June 21, 1987, I went down to San Ysidro, California to meet my sons, Refugio and Jesus Torres, who were coming to the United States from Mexico. I was detained by the I.N.S. near the border and I received voluntary departure. I left the United States as was requested of me and I returned within two days. I

have been told that because of this two-day departure, I do not qualify under the legalization law as it now stands.

I declare, under penalty of perjury, that the foregoing is true and correct.

EXECUTED this 1st day of December, 1987 at Oakland, California.

/s/ Carmen Torres
CARMEN TORRES

I declare that I am fluent in the English and Spanish languages and that I interpreted the foregoing from English to Spanish in the presence of the above-signed person and that she affirmed to me that she understood what is said and that it is true.

I declare, under penalty of perjury, that the foregoing is true and correct.

EXECUTED this 1st day of December, 1987, at Oakland, California.

/s/ Andrea Savedra
ANDREA SAVEDRA

STATE OF NEW YORK)
COUNTY OF NEW YORK)

1. My name is Yves Lorange. I am a native and citizen of Canada.

2. To the best of my recollection, I entered the United States for the first time in or about April 1979 by car through Champlain, New York, at the United States-Canadian border. I have no recollection of being examined regarding the nature of my visit.

3. I have permanently resided in the United States in unlawful status since April, 1979.

4. I have never committed any crimes in the United States or abroad.

5. I have never applied for or received a visa through false representations.

6. I have been consistently employed and have regularly filed required tax returns.

7. I have only briefly departed the United States since commencing unlawful residence here. In 1981, 1983, and 1984, I departed the United States for weekend visits with my parents in Canada. In October 1986, I departed for a ten day vacation. I always returned by car from Canada through Champlain, New York, and to the best of my recollection, I never made affirmative misrepresentations during my reentries, and I was never questioned in depth.

8. On June 20, 1987, I departed for two days to visit my family in Canada. I again returned by car through Champlain, New York. On August 12, 1987, I again departed for a brief vacation, and returned three weeks later by car through Champlain, New York. I was not questioned in depth upon either re-entry, and I did not make any affirmative misrepresentations upon either re-entry.

9. At the time of my 1987 departures, I was totally unaware of the Immigration and Naturalization Service requirement that I not depart the country after May 1,

1987 without permission. Although I read the newspapers daily and frequently listen to the radio and television, I never read or heard any Immigration and Naturalization Service announcement concerning the prohibition against departures after May 1, 1987. No one ever advised me that I could not leave the United States after May 1, 1987. Had I known, I would never have left the country because I believed I was qualified for amnesty.

10. I recently contacted the Legalization Support Project of Volunteers of Legal Service for assistance with my amnesty application. The staff attorneys advised me that I do not qualify solely because I departed and returned subsequent to May 1, 1987 without advance parole.

I declare under penalty of perjury that the foregoing is true and accurate.

Dated: New York, New York
December 4, 1987

/s/ Yves Lorange
YVES LORANGE

DECLARATION OF ONESIMO NUNEZ-SANCHEZ

I, ONESIMO NUNEZ-SANCHEZ, DEPOSE AND SAY:

1. I am a citizen and national of Mexico.

2. I entered the United States in 1970 without inspection at San Ysidro, California, and have, since that date, resided unlawfully in this country.

3. I live in with my wife and two United States children, ages 9 and 11, in Parlier, California. I am employed in agricultural work and support my wife and children. My employer is Okubo Farms, Inc., Reedley, California.

4. My wife came to the United States in May 1975 and has been residing here in unlawful status since that time.

5. To the best of my recollection, I have only been arrested twice, once in 1978, for disorderly conduct, and once in 1982 for drinking in public. I believe that the cases against me were eventually dismissed.

6. I have not received public assistance in the United States.

7. On or about April 25, 1987, my wife and I travelled to Mexico. This was the first time that I departed the country since I entered in 1970. We went to San Luis Rio de Colorado, in Sonora, Mexico, because my brother was very ill and I wanted to be by his side. I learned of my brother's condition through a telephone call from his wife from Mexico. He was urinating blood and was described to me as being very ill.

8. At the time we left the United States, we did not intend to abandon our residence in the United States. At the time of my departure I was very distrought and gave no thought to how I would return. I did not intend to engage in any criminal or immoral acts abroad; I only wanted to be with my brother, who I thought may be dying.

9. Before leaving the United States we were not aware

of the amnesty program, or of the fact that we might qualify for such a program. We had not heard any publicity regarding the need to obtain advance parole from the INS before leaving the country. If we knew about such a requirement, we would have sought permission to depart the country. While I was in Mexico I was never made aware of the fact that on May 1, 1987, the INS issued final regulations regarding legalization.

10. We returned to the United Staes on or about May 6, 1987, without inspection, near San Ysidro, California.

11. We were apprehended by INS agents in San Ysidro, approximately 15 minutes after reentering the country.

12. The apprehending agents insisted that we sign voluntary departure forms. I was told that if I did not sign the voluntary departure form I would be detained for at least fifteen days. They became angry when I refused to sign the form. I did not sign the form because I could not understand it. Even though I advised these agents that I had been living unlawfully in the United States since 1970, they did not advise me regarding any rights that I may have to amnesty or registry. I was afraid during this time and felt helpless and completely without rights. My wife was also not advised of any rights regarding the amnesty program.

13. I was held in a detention center in San Ysidro for about 4 or 5 days, and then transported to another detention center in Inglewood, California, where I was held for about another ten days before I was released on a bond of $2,000. My wife was released on the same date I was, also on a bond of $2,000.

14. At the time of our release we were again not advised of any rights we might have under the amnesty program. Instead, we were advised that deportation proceedings would be initiated against us. The INS has com-

menced deportation proceedings against me and my wife. The INS charges that we are deportable because we entered the United States without inspection in May 1987. Both the Immigration Judge and the INS Trial Attorney have stated in my hearing that I do not qualify for legalization because I entered the United Staes in May 1987 without inspection.

15. My family is poor and it causes us extreme hardship to have to undergo deportation proceedings. I do not have the ability to retain private counsel, and each appearance I am forced to make places my job in jeopardy and results in a loss of income badly needed for my family's support. I have already been required to appear four times before an Immigration Judge; each time I must travel about five hundred miles between my home and Los Angeles.

16. I desparately need a temporary work permit from the INS. I have had great difficulty locating permanent employment with a temporary work permit. I have only been at my present job for one week, and expect the job to last only two more weeks. I cannot support my family unless I can obtain a work permit.

17. The expulsion of my wife and myself would cause severe hardship to ourselves and our children. My United States children have never been to Mexico before. We would be forced to either move our children to Mexico, where educational opportunities and health services are barely available, or leave our children behind to be placed in a foster home in the United States. I would find it very difficult to find employment in Mexico, and therefore I would face enormous difficulties supporting my family if expelled.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 2nd day of December 1987, in the City and County of Los Angeles, State of California.

/s/ Onesimo Nunez-Sanchez
ONESIMO NUNEZ-SANCHEZ

DECLARATION OF TRANSLATION

I, Sister Annette Debs, depose and say:

DECLARATION OF EDUVIJES MARQUEZ

I, Eduvijez Marquez, declare:

1. I am a Mexican citizen.

2. I have lived continually in the United States, undocumented, since December of 1976.

3. I have never been arrested or convicted of any crime here in the US or in another country.

4. I live with my husband, Roberto Marquez, and my two daughters, who are US citizens. The oldest daughter, Ebelia Maria Marquez, is 8 years old and the younger daughter, Mariela Marqeuz, is 6. Both were born at Stanford, California.

5. Between 1981 and 1987, I worked as a housekeeper. Now I am not working, except that I take care of the children and the house. My husband supports the family with his work as a landscape gardener. He earns about $700 every two weeks, or $1,400 a month.

6. In 1978 and 1979, my daughters received AFDC assistance for 2 months. My husband and I had a fight and he left home for this time. Since I wasn't working at the time, I couldn't support my daughters. My husband returned after two months, and my daughters stopped receiving AFDC. Aside from this time, no one in my family has ever received any public assistance.

7. Since the time I began living here in the US, I had never left this country, until I left in May of 1987 for one month. This was my only departure in 11 years.

8. My brother, Rojeillo Reyes, died on May 17, 1987, in East Palo Alto, California.

9. On May 22, 1987, I left the US and went to San Nicolas de Ibarra, Jalisco, Mexico, to take the body of my brother to my parents' home. My mother had not seen my brother for four years and she wanted to see him one last time before they buried him.

10. I didn't know that if I left the US without the permission of Immigration, I wouldn't be able to "legalize" afterwards. I thought that, after living here for so long, I would still be able to be eligible for amnesty. I had never heard anything put out by Immigration saying that people who left the country after May 1, 1987 weren't going to qualify for amnesty. If I had known this, I would have applied for the permision to leave.

11. I only left in order to take the body of my brother to the home of our parents in Mexico. I wouldn't have left if it had not been an emergency.

12. When I went to Mexico, I wasn't thinking about how I would be able to return. I was very rushed and upset and I only thought about leaving. I got a national identity document from the Mexican consular office in San Jose, California, in order to be able to enter Mexico.

13. When I left the US, I wasn't thinking for a moment that I would leave permanently. My husband, my house, my entire life was here. I knew that I would return in a few weeks, and in fact I returned on June 22, 1987.

14. I returned to the US without inspection, on foot, through Tijuana. When I returned, I didn't realize that the return could affect my eligibility for amnesty. I thought that if the Border Patrol caught me, I would still be able to legalize because I had lived here for so many years.

15. If I am not permitted to legalize, it would be a great tragedy for my whole family.

16. My husband is eligible for amnesty and is applying. My daughters are US citizens. But if I am deported, the whole family would have to leave this country and live in Mexico. The girls are in school here, and are learning very well, completely in English. The school in San Nicolas, where my parents live, is not very good, unlike the schools here, and there is no secondary school. You have to pay a lot to go to school after the sixth grade in

another town, and it's likely that we would not be able to pay what is required. There is a lot of unemployment in San Nicolas – and now, much more than when I left there in 1976. It is very hard to find work, and they pay very little. Here in East Palo Alto, we live in a house which we are buying. If we have to go to Mexico, we would have to live with my parents. There are seven people living in a house with only three bedrooms. We would have to sleep on the floor. Life would be very hard for me and for my family if we had to leave our home here and go to Mexico. It would be very cruel, after living here for so long, to have to go live in Mexico.

17. I have not yet applied for amnesty because the lawyers at Catholic Charities and at Legal Aid of San Mateo County have told me that it's possible that I don't qualify, because of the departure in May. We don't have the money to waste in applying if there is no chance that I will be able to legalize. If the lawyers tell me that I might possibly qualify, I will submit my application immediately. I am praying for the chance, and I have faith that the laws of the US will not be so cruel as to deny this chance.

I declare under the penalty of perjury that the above facts are true and correct. Executed this ____ day of December, 1987 in the county of San Mateo, State of California.

CERTIFICATION OF TRANSLATION

I, Jennifer L. Wright, certify that I am competent to translate from Spanish to English, and that the above is a true and correct translation of the attached *Declaracion de Eduvijes Marquez*.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of December, 1987, in the county of San Mateo, state of California.

/s/ Jennifer L. Wright
JENNIFER L. WRIGHT
Declarant

DECLARATION

STATE OF TEXAS
COUNTY OF WEBB

I, Francisco Aboytes-Alberto, depose and say:

1. I am a citizen and national of Mexico. I was born on October 4, 1961 in Comonfort, Guanajuato Mexico.

2. I have continuoulsy resided in the United States in unlawful immigration status since approximately August, 1979.

3. My address is 4306 Callerman, San Antonio, Texas.

4. I believe that I qualify for Legalization under Sec. 245A of the Immigration Reform and Control Act of 1986.

5. I have no criminal convictions and have never received public assistance in the U.S.

6. I have never applied for or obtained a Visa through the use of false statements.

7. In late June of 1987, I left the U.S. and travelled to Guanajuato, Mexico because I received word that my father was extremely ill and would be undergoing surgery. Since coming to the United States in 1979, I had seen my parents only once in all these years. I wanted to see my father who was sick, at least one more time, in case the illness resulted in his death.

It was imperative that I go to see my parents because I ws the only one in my family who could take care of them while my father was ill and who could give them economic support. The only family member nearby could not take care of my parents because he worked and could only care for his own family.

8. Prior to departing the United States I heard no publicity regarding the need to obtain INS permission to leave the country. At the time of my departure I did not intend to give up my residency in the U.S., or my Legalization rights.

9. Had I known that it was necessary for me to obtain the

* * * * *

no thought to how I would return.

11. I intended to return within approximately 10 days.

12. After my father's operation my mother, who had just been operated, then became ill with stomach problems such as vomiting and not being able to hold down food. I, therefore was forced to remain in Mexico to care and support her and my father. She could not eat, so I had to help her eat liquids until she could eat regular foods.

13. I therefore unexpectedly and reluctantly was not able to return to the U.S. until approximately November 15, 1987.

14. I returned to the United States without inspection near Laredo, Texas. At that time, I believed that if I was apprehended by the INS, I would be allowed to apply for Legalization because of my many years of residency in the U.S.

15. Shortly after entering the U.S., I was seriously injured while riding on a freight train trying to get home to San Antonio, Texas. I have been in the hospital ever since with a broken hip, and an open wound extending from the testicles all the way to the front of my hip, and other serious injuries.

16. I wish to apply for Legalization in the United States and I am receiving assistance in the prepration of my application from Centro Aztlan, a non-profit organization accredited by the Board of Immigration Appeals, in Laredo, Texas.

17. It would cause me extreme hardship if I am denied legalization and forced to return to Mexico.

18. The medical staff has advised me that the medical care which I would receive in Mexico for my injuries would be completely inadequate and that my condition is so serious that it would be permanently injurious and detrimental to my health for me to be moved to Mexico,

which does not have the required physical facilities for my recovery. However, with the medical attention I am receiving in the U.S. I am told that I should have complete recovery and with therapy be able to resume a normal and productive life.

/s/ Francisco Aboytes-Alberto
FRANCISCO ABOYHTES-ALBERTO

I declare that I am employed by Centro Aztlan, and that I am fluent in both the English and Spanish language. I translated the declaration of Francisco Aboytes-Alberto, dated December 17, 1987, to him, prior to its execution, and he indicated that its contents were accurte.

/s/ Angelina Moreno
ANGELINA MORENA

SWORN AND SUBSCRIBED TO BEFORE ME, this the 17th day of December 1987.

/s/ Rosa Elia Morales
ROSA ELIA MORALES
Notary Public
State of Texas

"My commission expires June 29, 1988."

DECLARATIN OF SARAH B. IGNATIUS

I, Sarah B. Ignatius, under penalty of perjury under the laws of the United States, declare as follows:

1. I am the Staff Attorney for the Joint Legal Task Force on Central American Refugees (JLTF), located at 969 Eighth Avenue, Seattle, Washington 98104.

2. The JLTF represents Salvadoran and Guatemalan refugees applying for asylum in deportation proceedings brought by the Immigration and Naturalization Service in Seattle, Wshington, and advises other Salvadorans and Guatemalans concerning their legal rights.

3. A number of people whom we represent or advise are people who would be eligible for amnesty under the Immigration Reform and Control Act of 1986 (IRCA) as pre-1982 entrants except for the fact that they departed the United States for temporary periods subsequent to the enactment of IRCA and prior to or during the IRCA application period without obtaining advance permission from the Immigration and Naturalization Service. These peoples' purposes for departing the United States were innocent, such as family, emergency or other innocent reasons.

4. Some of these people returned illegally to the United States subsequent to May 1, 1987, and others remain outside the United States since they do not know what to do and do not want to return illegally.

5. Many, if not all, of these people did not know of any advance parole requirement prior to their departure from the United States.

6. To my knowledge the Immigrtion and Naturalization Service has not publicized to the general public the need for people eligible for amnesty under IRCA as pre-1982 entrants to obtain advance parole prior to their departure from the United States.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 2nd day of November, 1987.

/s/ Sarah B. Ignatius

SARAH B. INATIUS

DECLARATION OF PETER WALL

I, Peter Wall, depose and say:

1. I am a citizen and national of Mexico.

2. I entered the United States on or about January of 1980 on a visa which expired approximately six months later.

3. I have maintained unlawful residence in the United States since January 1980.

4. I have not been convicted of any crimes, have not received any public assistance and have never applied for a visa through false statements.

5. I have been advised by the legalization project of World Relief that I qualify for legalization but for the recent entry into the United States described below:

i) I am employed as a truck driver by Deese Express in Dinuba, California. On December 5, 1987, my boss instructed me to deliver a load of produce to Toronto, Ontario, Canada. I agreed to do this completely unaware that my departure would affect my right to legalization. In fact, I had applied for legalization before departing the United States.

ii) I returned to the United States approximately two days after leaving. I returned in the same truck owned by my employer, through Port Huron, Michigan. At the time of my return I was in the sleeper of the truck as another employee drove the truck. No INS officials questioned me nor did I make any false representation in order to return to the United States.

At the time of my departure from the United States, the sole purpose of my absence was to deliver produce to Canada for my employer.

I declare, under the penalty of perjury, that the above facts are true and correct. I executed this on the 22nd day of December, 1987, in Fresno, California.

/s/ Pedro Wall

PEDRO WALL
PETER WALL
PETE WALL

DECLARATION OF CECILIO VENEGAS

I, Cecilio Venegas, depose and say that:

1. I am a citizen of Mexico, born on 11-2-1957 in Tapatitlan Jalisco.

2. Presently I reside at 9305 SE Harold #12 Portland, Or. 97266. I have resided in the U.S. in an unlawful status since on or about 2-1978.

3. My initial entry was through the Tijuana California border without inspection. I subsequently reentered the U.S. with a passport and a valid tourist visa (B-2) on 4-27-79 and 9-17-80. Neither absence was for more than 30 days.

4. I have two brothers and three sisters who live in Portland Or. I currently live in Portland. I have two children, both born in the U.S. Cecilia Venegas 8-10-84 and Lubianka Venegas 12-14-87. The mother is Virginia Alonso.

5. I have no criminal convictions and I have not received public assistance.

6. I have no departures from the U.S. totaling more than 180 days since initial entry on 2-78, no absence was for more than 45 days durtion.

7. I learned on or about 6-24-87 that my mother was very ill, possibly dying. I learned this by phone from my sister. On 6-24-87 I went to the Legalization Office in Portland Or. to get permission to be at my mother's side.

8. I was told that I would need a letter from a doctor in Mexico which would state her condition. I was told that a telephone call would not suffice.

9. I was desparate that I might not see my mother before she died. The last time I had seen my mother was on or about 1-85 in Portland. I have always felt very close to my mother. I felt that I could not wait for the letter from the doctor. I saw at least a two weeks delay. I left

without permission on 6-25-87. I gave no thought as to how I would return or to the consequences of my action.

10. I visited my mother for no more than 30 days. (Exhibit 1 shows her condition as examined by her doctor)

11. I returned on or about 7-25-87 without inspection through Nogales-Arizona.

12. I applied on 12-22-87 for Status as a Temporary Resident. (Exhibit 2-Copy of application)

13. On January 6, 1988 I received a letter of denial from the Legalization Office in Portland Or. The reason for the denial is that I was absent without permission from I.N.S. after 5-1-87. My file number is A-91-374-072.

14. I will be unable to get a job without the Temporary Status, I will be unable to support my children and be a father to them. If deported I would have great difficulty finding a job in Mexico. Most of my family is in the U.S., in Portland Or. I came to the U.S. when I was 19 years old. There are roots here which would have to be torn out. (Exhibit 3-Denial letter)

I declare under the penalty of perjury that the above facts are true and correct.

Executed this day 1-9-88 in the city of Portland Or.

/s/ Cecilio Venegas

CECILIO VENEGAS

DECLARATION OF ENRIQUE ALMARAZ

I, ENRIQUE ALMARAZ, depose and say:

1. I am a national of Mexico. I was born May 4, 1958, in El Platanar, Jalisco, Mexico.

2. I have unlawfully resided in the United States since February, 1977. The information I provided in the application for status as a Temporary Resident, form I-687, attached hereto as Exhibit "1", is true and correct.

3. I have one United States Citizen child, age 6½, who lives with me.

4. I believe and have been advised by legal counsel that I qualify for legalization under the Immigration Reform and Control Act of 1986, other than that the Immigration and Naturalization Service considers me to be ineligible based upon an absence from the country and return without inspection after May 1, 1987.

5. I had to go to Jalisco, Mexico because I received a letter from a Dr. Torres Ruvalcaba, notifying me of my father Francisco Almaraz Hernandez' rapidly deteriorating health. The letter was dated June 18, 1987 but I did not receive it until on or about July 2, 1987. A copy of said letter is attached hereto as Exhibit "2".

6. I had not seen my father for approximately 5½ years. On or about July 3, 1987, my sister Antonia Almaraz received a phone call from our family in Jalisco. They told her that my father was dying and wanted to see me right away.

7. I left for Jalisco, Mexico on or about July 4, 1987. I was able to see my father who had been released from the hospital. When I saw him, however, I realized that he was seriously ill and I had him readmitted to the hospital. About one month later, I reentered the United States without inspection.

8. My father died on August 16, 1987. A copy of his death certificate is attached as Exhibit "3".

9. My purpose in visiting Mexico was not to engage in any illegal or immoral conduct not did I engage in any such conduct.

10. I did not intend to terminate my right to legalization, nor did I intend to abandon my residence in the United States.

11. I did not understand that my brief departure to Mexico and return to the United States after May 1, 1987 would terminate my right to legalization.

12. If I am not granted legalization pursuant to INA Section 245A, I will be subject to deportation if apprehended and will not be able to find employment in the United States in order to support myself and my United States Citizen son.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed this 13th day of January, 1988, in the City and County of Los Angeles.

/s/ Enrique Almaraz
ENRIQUE ALMARAZ

DECLARATION

I, Marshall G. Whitehead, depose and declare under oath as follows:

1. I am a practicing attorney in Phoenix, Arizona and am in good standing with the Arizona State Bar. I specialize in Immigration Law and am familiar with the provisions of the Immigration Reform and Control Act of 1986. I have prepared some 300 legalization cases since April of 1986.

2. My first contact with the Noriega family was in June of 1987 when Carmen Araujo came to me to request my assistance in applying for legalization. This declaration involves the case of *Maria Del Carmen Velarde De Noriega,* a Mexican national, age 56, the mother of Carmen and Gloria Noriega. Gloria Noriega, another daughter, came to me in July of 1987 to also apply for her legalization. At that time, it was mentioned to me that other members of the family wanted to apply for legalization, such as the mother, Maria Del Carmen De Noriega, and a son. Information was gathered about the other family members at that time but the applications were not prepared then due to lack of funds to pay for fees and costs.

3. Mrs. Maria Noriega first entered the United States in August, 1980 with a Border Crossing Card. She subsequently overstayed her visit and has continued to reside in the United States in an unlawful status since that time. Based upon the information provided me by her daughters Carmen and Gloria in June and July of 1987, it appeared that Maria Noriega was prima facie eligible for legalization.

4. Since her entry, Mrs. Noriega has returned to Mexico annually to visit her parents. Her stay never exceeded 3 days. In early August of 1987 Mrs. Noriega returned to Mexico for a brief, casual and innocent departure to obtain birth certificates for her children who were in need of that document in order to apply for legalization. She re-entered the United States with another Border Crossing Card on August 19, 1987 and given a conditional permit to remain until August 26, 1987.

5. Mrs. Noriega and her daughters Carmen and Gloria advised this affiant that on November 24, 1987 at 8:45 a.m. two Border Patrol Agents appeared at the Noriega residence in Phoenix, Arizona. They questioned Maria Noriega as to her immigration status and she was then informed she was illegally in this country and they proceeded to detain her. She was taken to the federal building in Phoenix and was questioned by Immigration or Border Patrol Officials. Mrs. Noriega and her daughters (who were with her) claimed she was eligible for amnesty and were in the process of applying for it. It was at that juncture that Mrs. Noriega was told she was not eligible for legalization due to her re-entry with a Border Crossing Card after May 1, 1987. She was then advised by these officials that if she insisted on a hearing in front of a judge there would be a high bond placed on her and she would stay in jail indefinitely until the bond ws paid.

6. After having been advised by the officials that she was not eligible for legalization and that she would be held in jail on a high bond, Mrs. Noriega signed a form I-274 requesting a voluntary return to Mexico. At that point, Mrs. Noriega was expelled to Mexico. Mrs. Noriega remains in Mexico as of this date believing that her re-entry into this country would make her ineligible for legalization.

7. Based upon the above facts, this Affiant believes the officials acted improperly in denying Mrs. Noriega an

opportunity to apply for legalization and in expelling her to Mexico and thus violated the provisions of the Immigration Reform and Control Act.

Further Affiant Sayeth Naught.

Dated: January 14, 1988

Signed: Marshall G. Whitehead
MARSHALL G. WHITEHEAD

Subscribed and sworn to before me by the above-named affiant at 3030 N. 3rd Street, Suite 960 Phoenix, Arizona this 14th day of January 1988

My commission expires: Oct. 7, 1991

/s/ Isidia Mārttinez
ISIDIA MARTINEZ
Notary Public

DECLARATION OF JUAN ANSELMO TORRES-RIVAS

I, Juan Anselmo Torres-Rivas, depose and say:

1. I am and citizen and national of Mexico.

2. I have continuously resided in the United States in unlawful immigration status since approximately November, 1980.

3. I reside at 2209 Ross, Laredo, Texas.

4. I have not received public assistance for myself while residing in the United States.

5. I have no criminal record.

6. Between November 6, 1986 and March 15, 1987, I was absent from the United States more than 180 days in total nor more than 45 days for any single absence.

7. On or about March 15, 1987, I was taken into custody in Laredo, Texas by the Immigration and Naturalization Service. I was taken to the U.S. Border Patrol station in Laredo, Texas, made to sign a form, and on the same day I was taken to the International Bridge, and told to leave the United States. The INS then made me walk across the bridge into Nuevo Laredo, Tamaulipas, Mexico.

8. At no time during my detention did the INS or U.S. Border Patrol agents advise me orally in writing about my right to legalization.

They did not even question me about my length of residence in the United States. They gave me no opportunity to explain my situation. They just told me that I was illegally in the United States and that I had to sign the Voluntary Departure form.

I signed the form because I thought I had no option. I was unaware of my legalization rights and no one explained them to me.

9. I returned to the United States without inspection on March 17, 1987.

10. I have been advised by a non-profit organization which assists legalization applicants that as a result of my improper expulsion, followed by my unknowing failure to file a legalization aplication by June 3, 1987, makes me ineligible for legalization under Sec. 245a.2.(a)(2)(i) of INS's final legalization regulations.

At no time during my improper detention and expulsion was I ever advised in any way regarding the June 3, 1987 deadline, by the INS or through any publicity.

I declare under penalty of perjury that the above facts are true and correct.

Executed this 13th day of January 1988 in the city of Laredo, Texas.

/s/ Juan Anselmo Torres-Rivas
JUAN ANSELMO TORRES-RIVAS

TELEGRAPHIC MESSAGE

IMMIGRATION AND NATURALIZATION SERVICE,
CENTRAL OFFICE
WASHINGTON, D.C.

PRIORITY UNCLASSIFIED

Accounting Classification – 5211

Date – NOVEMBER 14, 1986

No. CO 1588-P (WIRE #1)

For Information Call
AARON BODIN – 633-3240

MESSAGE TO BE TRANSMITTED

To: ALL REGIONAL COMMISSIONERS
ALL REGIONAL LEGALIZATION OFFICERS
ALL DISTRICT DIRECTORS
ALL CHIEF PATROL AGENTS
ALL OFFICERS IN CHARGE
COTF GLYNCO

THE PRESIDENT SIGNED INTO LAW THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 ON NOVEMBER 6. THE NEW LAW ALTERS SUBSTANTIALLY THE SERVICE'S OPERATIONAL PROCEDURES AND RESOURCE LEVELS. HOWEVER, IT IS OF CRITICAL IMPORTANCE THAT THE CHANGES REQUIRED TO RUN EMPLOYER SANCTIONS, LEGALIZATION AND SPECIAL AGRICULTURAL WORKER (SAW) PROVISIONS OCCUR SMOOTHLY WITH MINIMAL ADVERSE IMPACT ON EXISTING PROGRAMS. EXCEPT AS NOTED BELOW, OPERATIONS ARE TO CONTINUE

IN NORMAL FASHION. THESE GUIDELINES ARE TO BE IMPLEMENTED ON AN INTERIM BASIS, AND WILL BE FINALIZED AFTER CONSULTATION WITH REGIONAL AND FIELD OFFICES. COMMENTS FROM REGIONS, DISTRICT DIRECTORS AND CHIEF PATROL AGENTS SHOULD BE SUBMITTED TO CODEP BY NOVEMBER 29, 1986. ALTHOUGH IT IS EXPECTED THAT THE NUMBER OF ALIENS TO WHICH THE SERVICE WILL NEED TO GIVE SPECIAL CONSIDERATION DURING THE NEXT SIX MONTHS WILL NOT BE LARGE, THESE GUIDELINES WILL ESTABLISH AN ORDERLY TRANSITION DURING THIS PERIOD AND ENSURE THAT ALIENS ELIGIBLE FOR SPECIAL BENEFITS ARE GIVEN PROPER DOCUMENTATION:

1. BORDER OPERATIONS, BOTH AT AND BETWEEN PORTS OF ENTRY, ARE TO CONTINUE IN ACCORDANCE WITH PRESENT PRIORITIES:-IN THESE LOCATIONS IT WILL BE BUSINESS AS USUAL.

2. ALIENS APPREHENDED IN THE INTERIOR OF THE UNITED STATES ARE TO BE QUESTIONED TO DETERMINE WHETHER OR NOT THEY FIT CRITERIA WHICH MAKE THEM ELIGIBLE FOR LEGALIZATION OR "SAW" STATUS. THOSE WHO APPEAR TO QUALIFY ARE TO BE DOCUMENTED AS OUTLINED BELOW; ALIENS WHO ARE CLEARLY INELIGIBLE (CRIMINAL ALIENS AND THOSE WHO ENTERED THE UNITED STATES AFTER JANUARY 1, 1982, AND THOSE WHO ARE NOT ELIGIBLE FOR "SAW" STATUS) ARE TO BE PROCESSED FOR DEPORTATION.

3. ALIENS WHO WALK IN TO SERVICE OFFICES CLAIMING ELIGIBILITY FOR LEGALIZATION OR "SAW" STATUS AND REQUESTING WORK AUTHORIZATION ARE TO BE ADVISED TO WAIT UNTIL THEIR APPLICATIONS CAN BE HANDLED AT A LEGALIZATION OFFICE.

4. EXISTING EMPLOYER COOPERATION PROGRAMS ARE TO REMAIN IN EFFECT.

* * * * *

SOUTHERN REGION SERVICE CENTER
U.S. IMMIGRATION AND NATURALIZATION SERVICE
311 NORTH STEMMONS FREEWAY
DALLAS, TX 75207

SPOUSES AND CHILDREN OF ALIENS PROTECTED BY SECTION 210 (SMALL D) (1) OR SECTION 245A (SMALL E) WHO ARE IN THE UNITED STATES ON OR BEFORE THE DAY OF ENACTMENT AND WHO DO NOT QUALIFY IN THEIR OWN RIGHT FOR SPECIAL AGRICULTURE WORK OR LEGALIZATION STATUS SHALL BE GIVEN VOLUNTARY DEPARTURE OR A STAY OF DEPORTATION TO COINCIDE WITH THE PRINCIPAL ALIEN'S EMPLOYMENT AUTHORIZATION EXPIRATION DATE.

ALIENS WHOSE ENTRY DATE IS SUBSEQUENT TO ENACTMENT OR WHO APPLY FOR ENTRY BEFORE THE APPLICATION PERIOD, OR WHOSE CLAIM TO ELIGIBILITY IS PATENTLY FRIVOLOUS WILL NOT BE GRANTED EMPLOYMENT AUTHORIZATION. THEY WILL BE PLACED IN DEPORTATION OR EXCLUSION PROCEEDINGS AS APPRO-

PRIATE. PRIOR TO REMOVAL OF ANY ALIEN WHOSE STATUS UNDER THE NEW LAW IS QUESTIONABLE, THE OFFICER SHOULD CONSULT WITH HIS OR HER APPROPRIATE SUPERVISOR AND THE DISTRICT COUNSEL.

AN ALIEN WHO MAKES AN UNAUTHORIZED DEPARTURE AND ILLEGAL REENTRY AFTER ENACTMENT SHALL BE CONSIDERED TO HAVE BROKEN HIS PERIOD OF CONTINUOUS PHYSICAL PRESENCE AND THUS WILL BE INELIGIBLE FOR LEGALIZATION UNDER SECTION 245A. THEREFORE THE FOLLOWING

* * * * *

INS Legalization Manual

(Officially titled: "Procedures Manual for the Legalization and Special Agricultural Worker Programs of the Immigration Reform and Control Act of 1986")

Reprinted from Master Copy Provided by
the United States Immigration and Naturalization Service

[SEAL]

American Immigration Lawyers Association
1000 16th Street, NW • Suite 604 • Washington, DC 20036

D. Fingerprint chart (FD-258);

E. Documentation to support eligibility; and that

F. The application itself is completely filled out and signed by applicant.

Minor correctable deficiencies such as incomplete responses or typographical errors may be corrected by the LA and the applicant referred to the fee clerk for further processing. If there are major deficiencies in the application package or if the applicant is statutorily ineligible, the application will be rejected by the LA. In the case of incomplete applications, the applicant is to be instructed as to what is required to complete the application package and may be advised to seek assistance from a local designated entity. The alien shall be instructed to return to the LO after the noted deficiencies have been corrected. LAs maintain a count of the number of applicants who depart the LO without filing subsequent to the screening of their applications. If an applicant whose application has been rejected by the LA insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip from the LA stating the noted deficiency(ies).

4. *Applications Prepared by a Qualified Designated Entity*

When an alien indicates that assistance from a QDE was received in the preparation of the application, the receptionist will make a preliminary

PLAINTIFFS' EXHIBIT NNNN

TELEGRAPHIC MESSAGE

IMMIGRATION AND NATURALIZATION SERVICE,
CENTRAL OFFICE
WASHINGTON, D.C.

PRIORITY UNCLASSIFIED

Accounting Classification – 5211

Date Prepared –

File – CO 1588-P

For Information Call
AARON BODIN – 633-5311

MESSAGE TO BE TRANSMITTED

To: ALL REGIONAL COMMISSIONERS
ALL REGIONAL LEGALIZATION OFFICERS
ALL DISTRICT DIRECTORS
ALL OFFICERS IN CHARGE
ALL CHIEF PATROL AGENTS
COTF GLYNCO

LEGALIZATION WIRE NO. 9

THE FOLLOWING GUIDELINES AND DEFINITIONS ARE PROVIDED IN RESPONSE TO QUESTIONS AND REQUESTS FOR GUIDANCE FOLLOWING THE WIRE OF NOVEMBER 14, 1986 RELATING TO REFORM ACT IMPLEMENTATION, HEREAFTER REFERRED TO AS LEGALIZATION WIRE NO. 1. THESE GUIDELINES ARE TO BE USED IN DETERMINING WHETHER ALIENS HAVE ESTABLISHED PRIMA FACIE ELIGIBILITY FOR LEGALI-

ZATION AS THAT TERM IS USED IN NEW SECTION 245A OR A NONFRIVOLOUS CLAIM TO SPECIAL AGRICULTURAL WORKER (SAW) ELIGIBILITY AS THAT TERM IS USED IN NEW SECTION 210. THE DETERMINATION OF WHETHER AN ALIEN PRESENTS A PRIMA FACIE CASE FOR LEGALIZATION OR MAKES A NONFRIVOLOUS CLAIM TO SAW ELIGIBILITY MUST BE MADE ON A CASE-BY-CASE BASIS.

1. *NONFRIVOLOUS CLAIM TO SAW ELIGIBILITY.* SECTION 210 (SMALL D) PROVIDES THAT APPREHENDED ALIENS WHO ESTABLISH A NONFRIVOLOUS CLAIM TO SAW ELIGIBILITY CANNOT BE EXCLUDED OR DEPORTED. GUIDANCE HAS BEEN SOUGHT WITH RESPECT TO WHAT CONSTITUTES A NONFRIVOLOUS CLAIM TO ELIGIBILITY AS A SPECIAL AGRICULTURAL WORKER.

THE HOUSE-SENATE MANAGERS' REPORT ON THIS SECTION STATES THEIR INTENTION THAT THE SERVICE DO NO MORE THAN SECURE THE ALIEN'S ATTESTATION UNDER PENALTY OF PERJURY TO BASIC FACTS CONCERNING THE ALIEN'S EMPLOYMENT AND THE TYPE OF DOCUMENTATION THE ALIEN INTENDS TO PRODUCE DURING THE APPLICATION PERIOD TO SUPPORT HIS/HER CLAIM. LEGALIZATION WIRE NO. 1 SET FORTH THE INFORMATION TO BE OBTAINED IN SUPPORT OF AN ALIEN'S CLAIM TO ELIGIBILITY. IT IS NOT NECESSARY FOR THE ALIEN TO PROVIDE WITH CERTAINTY AND SPECIFICITY EVERY ITEM OF INFORMATION RELATING TO HIS/HER CLAIM. HOWEVER, THE FOLLOWING ARE MINIMUM REQUIREMENTS:

(1) AT LEAST 90 DAYS OF QUALIFYING EMPLOYMENT MUST BE CLAIMED;

(2) SPECIFIC AND PLAUSIBLE INFORMATION WITH RESPECT TO THE WORK ACTIVITY AND CROP FOR ALL QUALIFYING EMPLOYMENT MUST BE PROVIDED;

(3) THE ALIEN SHOULD IDENTIFY THE TYPE AND NATURE OF THE DOCUMENTATION HE/SHE INTENDS TO PRODUCE DURING THE APPLICATION PERIOD TO VERIFY THE CLAIMED EMPLOYMENT;

(4) REGARDLESS OF ANY SHOWING CONCERNING AGRICULTURAL EMPLOYMENT UNDER THESE GUIDELINES, ALIENS WHO INDICATE THAT THEY ARE EXCLUDABLE UNDER SECTIONS 212 (SMALL A) (9), (10), (23) EXCEPT AS IT RELATES TO A SINGLE OFFENSE OF SIMPLE POSSESSION OF 30 GRAMS OR LESS OF MARIJUANA, (27), (28), (29) AND (33) CANNOT ESTABLISH A NONFRIVOLOUS CLAIM TO SAW ELIGIBILITY;

THE INFORMATION PROVIDED MUST BE ACCEPTED AS TRUE ON ITS FACE UNLESS THE OFFICER HAS CONTRARY INFORMATION. IF THE CLAIM IS DENIED THE OFFICER MUST STATE THE BASIS OF THE DENIAL ON FORM I-213.

A SPECIAL AFFIDAVIT FORM HAS BEEN DEVELOPED AND WILL BE AVAILABLE FOR USE IN THE NEAR FUTURE. UNTIL THEN CONTINUE TO USE AFFIDAVIT FORMS I-215B OR I-215W.

FOLLOW THE PROCEDURES DESCRIBED IN LEGALIZATION WIRE NO. 1 AND ADVISE ALIENS

WHO HAVE ESTABLISHED A NONFRIVOLOUS CLAIM TO ELIGIBILITY THAT THEY MUST SUBMIT AN APPLICATION FOR SAW STATUS BETWEEN JUNE 1 AND JUNE 30, 1987.

2. *OTHER PERISHABLE COMMODITIES.* THE FOLLOWING INTERIM DEFINITION OF THE TERM "OTHER PERISHABLE COMMODITIES" AS USED IN SECTION 210 (SMALL H) IS PROVIDED FOR USE IN DETERMINING NONFRIVOLOUS CLAIMS TO SAW ELIGIBILITY. THIS DEFINITION IS SUBJECT TO CHANGE BY DEPARTMENT OF AGRICULTURE RULEMAKING PURSUANT TO SECTION 210 (SMALL H) BUT IS TO BE USED IN THE INTERIM. THIS DEFINITION IS DERIVED FROM THE LANGUAGE OF SECTION 210 (SMALL H) AND IS INTENDED TO EXCLUDE FROM CLASSIFICATION AS PERISHABLE COMMODITIES THOSE PRODUCTS WHICH ARE NOT PRODUCED BY THE TYPES OF LABOR LISTED IN SECTION 210 (SMALL H) WHICH REFERS TO ". . . FIELD WORK RELATED TO PLANTING, CULTURAL PRACTICES, CULTIVATING, GROWING AND HARVESTING OF FRUITS AND VEGETABLES OF EVERY KIND AND OTHER PERISHABLE COMMODITIES. . . ." THIS LANGUAGE INDICATES STRONGLY THAT ONLY PLANT PRODUCTS ARE CONTEMPLATED TO THE EXCLUSION OF LIVESTOCK AND RELATED PRODUCTS, WOOD, AND PROCESSED PRODUCTS. THE INTERIM DEFINITION IS AS FOLLOWS: "THE TERM 'OTHER PERISHABLE COMMODITIES' MEANS PLANT PRODUCTS WHICH REQUIRE PLANTING, CULTURAL PRACTICES, CULTIVATING, GROWING AND HARVESTING BY AGRICULTURAL FIELD WORKERS. LIVESTOCK, MEAT AND

MEAT PRODUCTS, DAIRY PRODUCTS, POULTRY AND EGGS, WOOD, AND PROCESSED PRODUCTS ARE NOT PERISHABLE COMMODITIES FOR THE PURPOSES OF DETERMINING A NONFRIVOLOUS CLAIM TO ELIGIBILITY UNDER SECTION 210 (SMALL D)."

3. *PRIMA FACIE ELIGIBILITY FOR LEGALIZATION.* UNDER SECTION 245A (SMALL E) ALIENS WHO ARE APPREHENDED OR IN CUSTODY DURING THE PRE-APPLICATION PERIOD WHO ESTABLISH PRIMA FACIE ELIGIBILITY FOR LEGALIZATION MAY NOT BE DEPORTED. PRIMA FACIE ELIGIBILITY IS ESTABLISHED IF AN ALIEN STATES UNDER PENALTY OF PERJURY THAT HE MEETS THE ELIGIBILITY CRITERIA FOR LEGALIZATION AND THAT HE IS NOT EXCLUDABLE UNDER PARAGRAPHS (9), (10), (15), (23) EXCEPT AS IT RELATES TO A SINGLE OFFENSE OF SIMPLE POSSESSION OF 30 GRAMS OR LESS OF MARIJUANA, (27), (28), (29), and (33) OF SECTION 212. THE ALIEN MUST PROVIDE FACTS AND INFORMATION SUFFICIENT TO DEMONSTRATE ELIGIBILITY. THE INFORMATION PROVIDED MUST BE ACCEPTED AS TRUE ON ITS FACE UNLESS THE OFFICER HAS CONTRARY INFORMATION. IF THE CLAIM IS DENIED THE OFFICER MUST STATE THE BASIS OF THE DENIAL ON FORM I-213. FOR THE PURPOSES OF SECTION 245A AN ALIEN IS NOT EXCLUDABLE UNDER SECTION 212 (SMALL A) (15) IF HE DEMONSTRATES A HISTORY OF EMPLOYMENT IN THE UNITED STATES WHICH PROVIDED SELF-SUPPORT WITHOUT RELIANCE ON PUBLIC CASH ASSISTANCE. THE AFFIDAVIT PROCEDURE SET FORTH IN LEGALIZA-

TION WIRE NO. 1 IS TO BE EMPLOYED FOR THIS PURPOSE. A SPECIAL AFFIDAVIT FORM IS BEING DEVELOPED FOR THIS PURPOSE BUT FORMS I-215B OR I-215W MAY BE USED UNTIL THE NEW FORM IS AVAILABLE. ADVISE ALIENS WHO HAVE ESTABLISHED A PRIMA FACIE CASE FOR ELIGIBILITY THAT THEY MUST SUBMIT AN APPLICATION FOR LEGALIZATION BETWEEN MAY 5 AND JUNE 3, 1987.

4. *APPREHENSIONS AT ENTRY.* CLARIFICATION HAS BEEN REQUESTED CONCERNING THE DIFFERENCE IN MEANING BETWEEN THE TERMS "INTERIOR" AND "AT ENTRY" FOR THE PURPOSES OF REFORM ACT IMPLEMENTATION. THE NEED FOR CLARIFICATION ARISES FROM THE FACT THAT ALIENS WHO ARE IN THE UNITED STATES AND WHO ARE APPREHENDED BY THE SERVICE ARE ENTITLED, UNDER THE EXPRESS PROVISIONS OF THE REFORM ACT, TO ESTABLISH ELIGIBILITY FOR LEGALIZATION OR SAW STATUS AND TO AVOID EXCLUSION OR DEPORTATION ON THAT BASIS. ALIENS APPREHENDED AT ENTRY, HOWEVER, ARE INELIGIBLE TO APPLY FOR SAW STATUS IN THE UNITED STATES AND ARE INELIGIBLE TO APPLY FOR LEGALIZATION.

ALIENS APPREHENDED IN THE ACT OF EFFECTING AN ILLEGAL ENTRY OR ALIENS DENIED ADMISSION ARE THEREFORE INELIGIBLE TO APPLY FOR ANY SAW OR LEGALZIATION BENEFIT IN THE UNITED STATES. IN OTHER CASES, ALIENS ARE TO BE REGARDED AS HAVING BEEN APPREHENDED AT ENTRY WHERE THE APPREHENDING OFFICER HAS PROBABLE CAUSE TO BELIEVE

THAT THE INDIVIDUAL ENTERED WITHOUT INSPECTION AFTER NOVEMBER 6, 1986. APPREHENSIONS DETERMINED TO BE AT ENTRY BASED ON PROBABLE CAUSE CANNOT BE DEFINED IN TERMS OF DISTANCE FROM THE BORDER OR OTHER SET FACTORS. AN ALIEN FOUND CONCEALED IN A VEHICLE OR LOCATED IN A REMOTE BORDER AREA WOULD NORMALLY BE CONSIDERED A BORDER APPREHENSION REGARDLESS THAT HIS ACTUAL ENTRY WAS NOT WITNESSED. AN ALIEN FOUND IN EMPLOYMENT IN A BORDER CITY SUCH AS EL PASO OR DETROIT WOULD NORMALLY NOT BE CONSIDERED A BORDER APPREHENSION. THE RANGE OF POSSIBILITIES BETWEEN THESE EXAMPLES INCLUDES FACTS WHICH WOULD SUPPORT OR NOT SUPPORT A DETERMINATION BASED ON PROBABLE CAUSE THAT AN ARRESTED ALIEN HAS BEEN APPREHENDED AT ENTRY. IN EACH CASE THE DETERMINATION OF WHETHER AN ALIEN HAS BEEN APPREHENDED "AT ENTRY" OR "IN THE INTERIOR" MUST REST ON THE STATEMENT OF THE APPREHENDED ALIEN AND/OR THE JUDGMENT OF THE ARRESTING OFFICER AND HIS SUPERVISOR.

5. *SELECTIVE SERVICE REGISTRATION.* GUIDANCE HAS BEEN REQUESTED CONCERNING THE OBLIGATION OF ENFORCEMENT OFFICERS TO DETERMINE WHETHER OR NOT APPREHENDED ALIENS WHO ARE PROSPECTIVE LEGALIZATION OR SAW APPLICANTS HAVE REGISTERED WITH SELECTIVE SERVICE. ALIENS APPREHENDED DURING THE PRE-APPLICATION PERIOD DO NOT HAVE TO COMPLY WITH SELECTIVE SERVICE

REGISTRATION REQUIREMENTS. SELECTIVE SERVICE REGISTRATION PROCEDURES AND INFORMATION WILL BE INCORPORATED IN THE FORMAL APPLICATION PROCESS.

6. *CRIMINAL EXCLUDABILITY UNDER SECTION 210.* GUIDANCE HAS BEEN REQUESTED CONCERNING CRIMINAL EXCLUDABILITY UNDER SECTION 210. SECTION 245A CONTAINS SPECIFIC LANGUAGE CONCERNING THE EFFECT OF MISDEMEANOR AND FELONY CONVICTIONS ON LEGALIZATION ELIGIBILITY. SECTION 210 DOES NOT CONTAIN PARALLEL LANGUAGE. HOWEVER, ALIENS CLAIMING SAW ELIGIBILITY ARE EXCLUDABLE UNDER SECTIONS 212 (SMALL A) (9), (10), (23) EXCEPT FOR A SINGLE OFFENSE OF SIMPLE POSSESSION OF 30 GRAMS OF MARIJUANA, (27), (28), (29), AND (33) AND ARE INELIGIBLE FOR SAW STATUS. NO WAIVER OF THESE GROUNDS OF EXCLUDABILITY IS AVAILABLE TO SAW APPLICANTS.

/s/ Alan C. Nelson
ALAN C. NELSON
Commissioner

[12/24/86]

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LEGALIZATION LOG

DECLARATION OF GEORGE INDELICATO

I, George Indelicato, declare as follows:

1. I am the director and General Counsel of the Catholic Charities of Los Angeles, Inc. I am formerly an Immigration Judge and held that position for six years before recently retiring from the government. Catholic Charities of Los Angeles is affiliated with the Catholic Archdiocese of Los Angeles. It is a non-profit private social services agency which provides a broad range of services designed to help the disadvantaged enter the mainstream of the community life and to bring comfort and assistance to those who are in need.

2. Our agency is very involved in the implementation of the legalization provisions of the Immigration Reform and Control Act of 1986. Since the beginning the legalization program, in May 1987, our agency has assisted over 17,000 applicants. We anticipate assisting between 30,000 and 40,000 applicants before the legalization application period ends in May 1988.

3. We believe that we are the agency processing the largest number of applicants for legalization in the State of California, and possibly in the country. We are designated as a Qualified Designated Agency by the Immigration and Naturalization Service to assist legalization applicants prepare their applications.

4. The final INS regulations published in May 1987 implementing the legalization provisions of the Immigration Reform and Control Act of 1986 made ineligible aliens who had briefly departed the country and returned improperly using non-immigrant visas. This policy was only changed on or about October 10, 1987.

5. Because of the original policy, during the first few months of the application period, we discouraged potential applicants from filing applications if they were con-

sidered ineligible under the regulations then in effect because of brief departures followed by reentries using non-immigrant visas.

6. Based on my experience dealing with the legalization program, and my many contacts with other directors of agencies assisting applicants, I believe that thousands, if not tens of thousands, of potential applicants for legalization who qualify for the benefit do not know that INS has now changed its policy regarding reentries affected with non-immigrant visas during the required period of unlawful status.

7. In my judgment, unless INS is required to engage in a multi-lingual publicity effort to advise these aliens of the change in policy, thousands will never learn about the change and will not apply for legalization before the end of the application period.

8. The vast majority of people who qualify for legalization cannot afford an attorney and prepare their own applications. According to the INS, the great majority are also not receiving assistance from non-profit groups or the Qualified Designated Agencies. Our agency does not have the resources to engage in a publicity campaign, and, while we are processing thousands of applicants, we have no contact at all with the great majority of potential applicants.

9. To my knowledge, the INS has taken no steps to publicize this change in policy. Churches and community organizations simply do not have the resources to do extensive outreach to inform these persons of their eligibility for legalization.

10. In addition to publicity about the change in policy, I believe that eligible aliens will not all have the opportunity to apply for legalization before the end of the application period. I therefore believe that at least for those aliens

who previously were left to believe that they were ineligible for legalization, the application period should be extended so that they have a full twelve month period to apply. Given our backlogs at Catholic Charities, this is certainly the only way that we could assist these aliens completing their legalization applications.

11. I believe that the policy originally stated by the INS in its final regulations, deeming ineligible for legalization aliens who had departed the United States and returned improperly using non-immigrant visas, was unlawful.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Executed this 29th day of October, 1987, in Los Angeles, California.

/s/ George Indelicato

GEORGE INDELICATO

DECLARATION

I, Marc Van Der Hout do hereby declare:

1. I am an attorney at law licensed to practice in the state of California, and have been practicing immigration law for close to ten years.

2. Over the past ten years, I would estimate that I have represented several thousand individuals in proceedings before the Immigration and Naturalization Service, the Immigration Courts, the Board of Immigration Appeals, the United States District Courts, and the United States Federal Courts of Appeals.

3. I am currently an adjunct professor teaching immigration law at Hastings College of the Law, and last year taught at Boalt Hall School of Law. I am past chair of the National Immigration Project of the National Lawyers Guild, past co-chair of the Litigation Training Committee of the American Immigration Lawyers Association, and currently acting as chair of the liaison committee to the Executive Office for Immigration Review of that association. I have lectured extensively throughout the United States on many aspects of immigration law, and have authored or co-authored many publications and articles on immigration law. Attached to this declaration is my curriculum vitae.

4. It has been the practice of the San Francisco District legalization office to deny individuals the right to file an application for legalization under the Immigration Reform and Control Act of 1986 if the individual had been in unlawful status prior to January 1, 1982, departed the United States post January 1, 1982, and re-entered on a non-immigrant visa.

5. I know this because in August of this year I was at the San Francisco legalization office when an individual came in seeking to apply for legalization. She was met at the reception desk by a clerk and when she explained the

facts of her case, as outlned above, she was told that she did not qualify for legalization and could not file. The clerk told her this after departing the front of the office and going to the back and speaking with her supervisor. I personally witnessed this.

6. It is my experience, having spoken publicly to many groups over the past several months about the Immigration Reform and Control Act of 1986 and having spoken to many individuals seeking to apply for legalization, that there are many persons who are in the exact situation as described above, who had been advised that they were ineligible to apply for legalization.

7. Suesequent to the change in INS policy on October 8, 1987, I have seen no attempts by the Immigration & Naturalization Service in the San Francisco Bay Area to inform the public of the change in the policy and to attempt to advise people in the public so that they would know that they are now eligible to apply.

8. Such an educational program would be essential to correct the misinformation that has been given out in the past and to properly advise individuals in this area who may qualify. It is my opinion, having practiced immigration law for close to ten years and being intimately familiar with the immigrant community, that there are many, many individuals who would now be eligible for legalization but who have no knowledge that they may now apply due to having been previously informed, either personally, by word of mouth, or by INS prior statements, that they are not eligible to apply.

I declare under penalty of perjury that the foregoing is true and correct, executed on the 29th day of October, 1987, at San Francisco, CA.

Signed: Marc Van Der Hout

MARC VAN DER HOUT

I, Isabel Garcia Gallegos, an attorney duly authorized by and in good standing with the State Bar of Arizona hereby depose and declare the following:

1. I am involved in the direct delivery of services to individuals who qualify under the legalization provisions of the Immigration Reform and Control Act of 1986.

2. As the chairperson of TECLA (Tucson Ecumerical Council Legal Assistance for Central Americans), and coordinator of both the Southern Arizona Coalition on Immigration and the Arizona Coalition for Immigrant and Refugee Rights, I am directly involved in the monitoring and reviewing of the legalization process of these organizations.

3. These organizations deliver services to all Southern Arizona which includes Tucson Arizona.

4. I have been involved since the inception of the legalization program in May 1987.

5. I am aware of the policy change announced by INS Commissioner Alan Nelson on October 8, 1987, regarding the previous ineligibility of persons who entered the United States after January 1, 1982, with an I-94 permit.

6. Prior to this change, the legalization offices in Southern Arizona had rejected, and otherwise, discouraged individuals who had, in fact entered the United States with an I-94 after January 1, 1982;

7. After the announcement made by Commissioner Nelson on October 8, 1987, neither the INS nor the legalization offices have informed the general public of the change nor an explanation other than what was reported in the English printed mediums of communication.

8. As a result, the undocumented community is not aware of the change nor its significance.

9. As a further result, many individuals who would qualify believe that they do not qualify.

10. The aforementioned organizations are non-profit and already are working beyond their limited resources.

11. As a consequence, these organizations can reach very few of those who are affected by this change.

12. Based on my experience, the only way to reach the affected population would be for the INS or the legalization offices to launch a multi-lingual campaign to educate and inform.

13. Furthermore, the application period would have to be extended an additional six (6) months so that the educational campaign can bring forth those affected so that they may be assisted in their applications;

14. The requirement of a filing of a waiver should be eliminated, as the costs of legalization have already showed to be extremely high for many individuals;

15. The waiver requirement does not serve any purpose as intended by Congress.

I declare the above upon my information and belief, and under penalty of perjury.

/s/ Isabel Garcia Gallegos
ISABEL GARCIA GALLEGOS

Subscribed and Sworn to before me this 29th day of October, 1987, by Isabel Garcia Gallegos.

My commission expires: 3/1/91

./s/ Mary Colette Shouron
MARY COLETTE SHOURON

October 26, 1987

I, Pilar Cuen depose and say that I am Legalization Counselor for Centro de Asuntos Migratorios which is a non-profit organization specializing in the delivery of immigration services in Chula Vista, CA USA.

Centro de Asuntos Migratorios is heavily involved in assisting aliens to apply for legalization pursuant to section 45 A (a) of the Immigration Reform and Control Act of 1986 (IRCA). Since May 1987 to the present we have assisted many clients. Our agency anticipates serving many more clients before the end of the legalization application period.

Until approximately October 8, 1987 policy announcement made by Immigration and Naturalization Service (INS) Commissionr Alan C. Nelson, the INS held that immigrants who otherwise qualified for legalization, but who had left the United States between January 1, 1982 and November 6, 1986 and who had re-entered the United States with a non-immigrant visa were ineligible for legalization.

INS has refused applications for legalization because our clients entered after January 1, 1982 with a non-immigrant visa and an I-94 was issued at the time of re-entry.

Knowledge of this INS position quickly spread through the community which we serve, consequently, many persons thinking that they are ineligible for legalization have decided not to apply for this benefit.

Based upon my involvement in this service and my discussions with community leaders, I am aware that many undocumented persons who left after January 1, 1982 and returned with a non-immigrant visa believe that they do not qualify for legalization.

To my knowledge the INS has undertaken no effort to publicize their policy change in the affected communities. Unless a major publicity campaign is undertaken and unless this is carried out in the most expedient manner, thousands of undocumented persons will never know of the policy change and will not apply for legalization timely. The only way to reach this population at this late date in the legalization process will be through a multi-lingual publicity campaign similar to the employer sanctions campaign INS launched several months ago.

The resources of our agency and other non-profit organizations in engaged in the delivery of legalization services are already stretched to the limit. Therefore, neither the resources nor the personnel exist among these agencies to carry out the type of publicity required to reach all aliens affected by this policy change.

In my view, non-profits and private attorneys will have a tremendous difficulty in timely advising the great majority of affected persons of their possibility to qualify in view of the recent INS policy change. Additionally, most non-profits are operating at full capacity and a majority of agencies are experiencing appointment backlogs. Therefore non-profits and the private bar will not be able to adequately assist in this regard.

Based on all my experience in the delivery of legalization services, it is my opinion that the only way in which the community of potential applicants who previously thought to be ineligible for legalization can have a reasonable opportunity to apply will be for the application period to be extended for a six month period.

I declare under penalty of perjurfy that the above is true and correct to the best of my knowledge.

Executed at Chula Vista, CA on this 26 of October of 1987

/s/ Pilar Cuen

PILAR CUEN
Legalization Counselor

DECLARATION OF NADINE K. WETTSTEIN

I, Nadine K. Wettstein, under penalty of perjury, hereby declare as follows:

1. I am managing attorney of the Southern Arizona Legal Aid, Inc. Legalization Project. In that capacity, I am a legal resource for Qualified Designated Entities (QDEs), agencies helping people file their applications under the Immigration Reform and Control Act of 1986 (IRCA). I also am lead counsel in two class actions filed under IRCA, challenging the practices and policies of the Immigration and Naturalization Service (INS) in its implementation of IRCA.

2. In my capacity as legal resource for QDEs, I receive telephone inquiries every day from QDEs and other people helping persons apply under this law. Until the INS announced its new "I-94" policy on or about October 8, 1987, the INS position had been and consequently we were advising the QDEs that people who entered the United States after January 1, 1982 with an I-94 that they would not qualify for IRCA legalization unless the policy were changed. As a result, the QDEs would advise the clients not to file their applications and the QDEs would not prepare the applications or work on the files.

3. In addition, the QDEs have told me of cases where people applied at the Legalization Office and admitted in their applications that they had reentered with an I-94 after 1/1/82. Those applications were rejected by the LO.

4. I have personally heard of dozens of cases where people believed they were ineligible because they entered after 1/1/82 with an I-94. Based upon my experience and involvement in this issue, there are probably hundreds of such cases. Most of these people probably have not heard of this change in INS policy; undocumented people primarily obtain information through word of mouth or

possibly from local Spanish language media.

5. To date I have not heard or seen any publicity from the INS about this new policy. The only publicity was an article in the local (English language) newspaper the day following the announced change. Although the INS is aware of my work, no one has contacted me, either personally or through something in writing, to inform me about this policy or ask me to publicize it.

6. Neither the QDEs nor my program has enough resources to adequately reach the numbers of people who are under a misunderstanding that they do not qualify because of I-94 problems.

7. Some of the QDEs in Arizona are enormously backlogged. I fear they will be unable to adequately handle the added burdens created by the new policy. While I am delighted that the INS has changed its policy, it also is requiring waivers be filed in many situations. As a result, the QDEs' workload will multiply.

8. Based upon my experience, only an extension of the filing deadline for these applicants would assure that the people who can now apply but who were informed that they could not qualify can receive the benefits to which they are entitled.

Upon penalty of perjury, I declare that the foregoing is true and correct to the best of my knowledge.

Executed this 28th day of October, 1987.

/s/ Nadine K. Wettstein
NADINE K. WETTSTEIN

AFFIDAVIT

STATE OF ARIZONA
County of Maricopa

I, Joanne T. Stark, being first duly sworn, depose and say:

1. My name is Joanne T. Stark.

2. I am a lawyer specializing in the practice of immigration law. I also serve as Vice Chair of the Arizona Chapter of the American Immigration Lawyers Association.

3. I work for Nancy-Jo Merritt and Associates, P.C.

4. As part of my practice, I assist undocumented aliens in making application for temporary legal residence pursuant to Section 245A and Section 210 of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986.

5. From May, 1987 – the present month, our firm has assisted approximately 200 such individuals. We anticipate a similar rate of representation during the remaining months of the application period.

6. Until the October 8, 1987 announcement made by Commissioner Nelson of the Immigration and Naturalization Service, the Service's policy was that aliens who otherwise qualified for legalization but who had left the United States between January 1, 1982 through the present and entered on a nonimmigrant visa documented by an I-94, were ineligible for legalization under Section 245A.

7. I am aware that the Service has discouraged application in the past by such people or has rejected applications made.

8. Knowledge of the Immigration and Naturalization Service's position concerning rejection of applicants whose immigration history contained I-94 entries during the rele-

vant period of time quickly spread throughout our community.

9. Many would be applicants for legalization, believing themselves to be ineligible, have decided not to apply for legalization.

10. Based upon my contacts within the local community. I believe that many aliens who, after having been living illegally in the United States since before 1982, left briefly and returned on short term nonimmigrant visas believe that they are not qualified for legalization.

11. The Immigration and Naturalization Service has not actively advertised its change in policy in our community.

12. Unless a major media campaign is undertaken, many undocumented aliens will not be made aware of this major policy change. The only way to reach these people will be through a multilingual publication campaign similar to that undertaken to educate the public concerning the employer sanctions provisions of the new Act.

13. Resources of private attorneys and nonprofit agencies in my community are limited. The application period currently ends in less than seven months. I believe that in order to reach the majority of the pool of potential applicants, the legaliztion application period should be extended for six months.

14. I further recommend that the requirement of a waiver not apply to applicants whose continuous illegal presence was interrupted by I-94s.

/s/ Joanne T. Stark
JOANNE T. STARK

Subscribed and sworn to before me this 29 day of October, 1987.
My commission expires: 10-31-89

/s/ Lynn I. Lane
LYNN I. LANE
Notary Public

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-4757-WDK (JRx)

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PLAINTIFFS,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS.

[FILED JUL 15, 1988]

FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 1987, plaintiffs, consisting of ten organizations and six individuals, instituted this proposed class action for declaratory and injunctive relief against the Immigration and Naturalization Service (INS) and its Commissioner. Plaintiffs challenged recent INS regulations implementing the broad amnesty for illegal aliens passed by Congress in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 8 U.S.C.A. § 1255a (West Supp. 1988) (IRCA). The time in which to apply for legalization was set by the INS pursuant to congressional authorization for the period between May 5, 1987 and May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988).

To qualify for legalization, a deportable alien must establish that he entered the United States before January

1, 1982 and that he has "resided continuously in the United States in an unlawful status since [January 1, 1982] and through the date the application is filed. . . ." 8 U.S.C.A. § 1255a(a)(2) (West Supp. 1988). Recognizing that illegal aliens would naturally maintain some contact with their legal domicile, Congress provided that certain brief departures from the United States between January 1, 1982 and November 6, 1986 would not break an alien's continuous unlawful residence. *See* 8 U.S.C.A. § 1255a(g)(2)(A). The maximum period of time an alien may be absent from the United States and still qualify for amnesty has been set at 45 days at any one time and 180 aggregate days between January 1, 1982 through the date the application for legalization is filed. 8 C.F.R. § 245a.1(c)(1)(i) (1988).

The INS regulation at issue originally provided that an alien's eligibility would not be affected by reentries into the United States subsequent to January 1, 1982 "that were not documented on Service Form I-94, Arrival-Departure Record." 8 C.F.R. § 245a.2(b)(8) (1988). In effect, the INS took the position that aliens who fraudulently procured a non-immigrant visa, INS Form I-94, or other forms of documentation, were not in this country unlawfully during the relevant time period. Thus, if an otherwise eligible alien reentered the United States subsequent to January 1, 1982 by means of such documentation, the INS would deny a stay of deportation, employment authorization, and legalization. Plaintiffs contested this position, arguing that aliens who reentered the United States using fraudulently procured documentation were indeed unlawfully residing in this country as contemplated by the statute.

Plaintiffs originally sought a declaration that the INS regulation was inconsistent with the provisions of IRCA and that it violated the equal protection clause because the regulation was not being applied to other similarly situated

aliens. In addition, they requested that further implementation of the regulation be temporarily and permanently enjoined. Finally, though not stated in their initial complaint, plaintiffs asked that one year legalization period contemplated by IRCA be extended six months to compensate for the time that the allegedly erroneous policy has been in effect and that the INS be ordered to formulate and implement, following court approval, an outreach program designed to inform aliens and interested organizations of the repeal of the regulation.

On October 8, 1987, INS Commissioner Alan Nelson announced a change in INS policy with respect to aliens who returned to the United States using a non-immigrant visa. At a hearing in which this Court was to address plaintiffs' motion for class certification and defendants' motion to dismiss, the parties discussed with the Court whether and to what extent the INS' action had rendered plaintiffs' complaint either moot or not ripe for review. The Court withheld further consideration of all issues presented in order to give the parties time to assess the new regulation and its implications.

Under the new regulation, aliens who (1) were otherwise eligible for legalization, (2) were present in the United States in an unlawful status prior to January 1, 1982, and (3) reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence, were eligible for legalization, provided they applied for and received a waiver of exclusion. *See* 8 C.F.R. §§ 245a.2(b)(9) and (b)(10) (1988).[1] The regulation was

[1] In order to be eligible for legalization, an alien must be "admissible to the United States as an immigrant." 8 U.S.C.A. § 1255a(a)(4)(A). A determination of whether an alien is admissible requires consideration of the various grounds for exclusion. For example, if an alien is mentally retarded, insane, psychologically or sexually deviant, afflicted with a contageous disease, a vagrant, a

predicated upon 8 U.S.C.A. § 1182(a)(19) (West Supp. 1988), which provides that an alien may be excluded from admission to the United States if the alien, "by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter." Thus, even if an alien had lawfully obtained a non-immigrant visa, the fraudulent use of that visa to gain entry into the United States would render the alien excludable under § 1182(a)(19) and require that an application for a waiver of excludability be filed along with the legalization application. *See* 8 U.S.C.A. § 1255a(d)(2)(B). (West Supp. 1988) (making excludability under § 1182(a)(19) waivable "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest").[2]

Following the change in policy by the INS, plaintiffs sought to amend their complaint. On April 4, 1988, plaintiffs lodged with the Court a proposed First Amended Complaint. At an informal hearing on the matter, the Court identified *sua sponte* a number of jurisdictional and related problems, including the standing of some of the plaintiffs to assert the various claims made and the fact

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polygamist, a prostitute, has been convicted of a crime involving moral turpitude or a felony, has engaged in any immoral act, is a national security risk, or was associated with the Nazi government in Germany, he may be excluded. *See* 8 U.S.C.A. § 1182(a) (West 1970 & Supp. 1988). The majority of these grounds for exclusion will automatically preclude legalization, while a minority may be waived by the attorney general, thereby permitting legalization. *See* 8 U.S.C.A. § 1255a(d).

[2] An alien seeking admission to the United States, who holds himself out as a nonimmigrant when in fact he is returning to an illegal residence in the United States, would have fraudulently procured entry into the United States.

that the allegations of several of the individual plaintiffs failed to bring them within the two proposed subclasses. Rather than deny the motion for leave to amend, the Court suggested that plaintiffs consider the concerns raised and modify their complaint accordingly.

On June 1, 1988, this Court granted plaintiffs' motion to amend their complaint. By their First Amended Complaint, plaintiffs, now six organizations and five individuals, essentially raise two issues. First, they continue to assert their claim that 8 C.F.R. § 245a.2(b)(8), prior to its modification, was inconsistent with IRCA. They therefore seek a declaration that the original policy was arbitrary and capricious, an order of this Court extending the application period to November 30, 1988, and a court-ordered publicity campaign to be conducted by the INS to inform members of the first subclass of the modified policies and the extended application period.

The second issue raised is a challenge to the modified policy, as set forth in 8 C.F.R. §§ 245a.2(b)(9) and (b)(10), insofar as the INS requires a waiver application to be filed by those individuals who "legitimately obtained a non-immigrant visa in good faith prior to January 1, 1982, but who later used the same visa to reenter the United States when returning from a brief departure. . . ."[3] As relief, plaintiffs seek a declaration vindicating their position, a writ of mandamus compelling the INS to comply with the terms of IRCA, an order requiring the INS to refund the $35 application fee, and an order directing the INS to destroy all waiver applications acquired as a product of the modified policy.

At a hearing conducted on July 11, 1988, this Court ordered that the case be certified as a class action. Two distinct subclasses were identified. The first subclass was

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[3] First Amended Complaint ¶ 35.

defined to include all persons who qualify for legalization but who were deemed ineligible for legalization under the original policy, who learned of their ineligibility following promulgation of the policy and who, relying upon informatino that they were ineligible, did not apply for legalization before the May 4, 1988 deadline. The second subclass comprises all persons who qualify for legalization and who entered the United States with non-immigrant visas not acquired through fraud or misrepresentation, who subsequently briefly departed the United States and then returned by improperly using their non-immigrant visas, and who are therefore required to apply for waivers of excludability and to pay a $35 application fee.

The parties agree that no facts remain to be determined regarding the propriety of the original and modified policies, although factual questions may still remain concerning the availability of the relief requested. This was acknowledged at oral argument. Resolution of the legal issues before this Court will therefore resolve whether the claims of the two subclasses have any merit.

DISCUSSION

I. Standard of Review

At the outset, it is critically important to understand the scope of this Court's inquiry. As determined by the Supreme Court, when called upon to review an agency's construction of a statute which the agency must administer, a court must first ascertain whether Congress has directly addressed the precise question presented. If the intent of Congress is readily discernible, the inquiry is ended, since both the court and the agency must effectuate the "unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote

omitted). However, if the court "determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). Significantly, the Court also added that a reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. *See also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-26 (1985) (requiring clear, unambiguous intent of Congress contrary to agency interpretation to overturn that interpretation).

II. Original Policy

Plaintiffs' first claim for relief presents the singular question of whether the INS' regulation implementing the "continuous[ ] . . . unlawful status" requirement of § 1255a(a)(2) is reasonable. This is because Congress explicitly delegated the task of interpretation to the INS. *See* 8 U.S.C.A. § 1255a(g)(1). As a result, the regulation promulgated by the INS must be accorded "considerable weight." *Chevron,* 467 U.S. at 844.

A. Reasonableness of Original Policy

1. Plain Meaning of the Statutory Scheme—The focal point of this lawsuit centers on aliens who entered the United States and acquired illegal status prior to January 1, 1982. Generally, this entry would have occurred either

by an alien's remaining in this country beyond the authorized period, failing to maintain nonimmigrant status, or committing certain enumerated crimes. The important point, however, is that the aliens in the first subclass were no longer legally in the United States as of January 1, 1982 and therefore satisfy the threshold time limitation of § 1255a(a)(2).

Clearly, as both sides acknowledge, IRCA expressly permits an alien to leave the United States for brief periods of time. *See* 8 U.S.C.A. § 1255a(g)(2)(A).[4] According to the original INS policy, however, an alien would lose his continuous unlawful residency status if his entry were documented on INS Service Form I-94. *See* 8 C.F.R. § 245a.2(b)(8) (1988).[5] Consequently, any alien who could only gain entry into the United States by presenting documentation—as contrasted with simply crossing a desolate portion of the U.S. border and therefore avoiding inspection altogether—effectively lost the privilege of brief departure granted by Congress in § 1255a(g)(2)(A). It is

[4] It should be recalled that the INS regulations implementing this provision establish that an alien will be deemed to have maintained continuous uniawful residence in the United States so long as no single absence from the United States exceeded 45 days and the total period of absence did not exceed 180 days. *See* 8 C.F.R. § 245a.1(c)(1)(i) (1988).

[5] Entry into the United States actually involves a two step procedure. First, in a typical situation, an alien would acquire a nonimmigrant visa at a United States consulate in his country. One such visa—a B-2 visitor's visa—would, for example, permit the alien to remain in the United States for a minimum six month period. *See* 8 C.F.R. § 214.2(b)(2) (1988). Having procured a visa, the alien would travel to the United States and present himself for inspection at the U.S. border or a port of entry. The alien would then be issued an INS Form I-94 documenting his entry in the United States, his nonimmigrant status, and the period of time he is authorized to stay in the United States. *See* 8 C.F.R. § 235.1(f) (1988).

for this reason that plaintiffs contend that the INS' original policy, as manifested in 8 C.F.R. § 245a.2(b)(8), is inconsistent with the obvious intention of Congress, for Congress plainly knew that reentry into the United States could only be accomplished either by avoiding inspection or by improperly using a non-immigrant visa when presenting oneself for inspection.

Defendants argue that their initial regulation was reasonable because they sought to "adopt a bright line test" to use in effectuating the "unlawful status" requirement. According to defendants, there are only two ways in which an alien presenting himself for inspection can enter the United States. The alien may either use a then unexpired Form I-94 or obtain a second non-immigrant visa because his initial visa had expired. In both cases, however, defendants assert that since the alien holds facially valid entry documentation, the sole basis for the alien's excludability and hence illegal status was that individual's fraudulent intent to remain in the United States beyond the limited duration of the documentation. Consequently, fearing "rampant fraud and abuse" concerning the existence or nonexistence of that fraudulent intent at the time of reentry, the INS promulgated a regulation which would obviate any need to inquire into the difficult issue of an alien's subjective intent. Defendants therefore argue that their original position was reasonable and should be upheld.[6]

Although superficially plausible, defendants' argument cannot withstand analytical scrutiny for a number of

[6] The INS could not, of course, take the position that an alien who reentered the United States fraudulently was here lawfully. The use of false documentation to procure entry constitutes one basis for excluding and/or deporting the individual. *See* 8 U.S.C.A. § 1182(a)(19).

reasons and despite the considerable deference it must be accorded. First, the underlying premise of this argument is inconsistent with Congress' express intent to permit illegal aliens to leave the United States for brief periods of time. Given this intent, and in view of the fact that the *only* way an alien who seeks to gain entry into this country by border inspection can succeed is to present documentation acquired and/or used with fraudulent intent, Congress could not have intended that the facial validity of the documentation could break the continuity of an alien's illegal residence.[7] The INS would thus not even be forced to ascertain the alien's intent at the time of reentry.

A second reason for rejecting the INS' position is that even if the INS were forced to undertake the admittedly difficult task of determining an alien's intent, Congress' willingness to permit brief departures from the United States without distinguishing how reentry was achieved is indicative of Congress' decision to have the INS perform that task. The difficulty attendant with implementing a statutory scheme is not an excuse for limiting one provision of that scheme.

Third, in the context of these other indicia of the unreasonableness of the initial regulation, the many other examples where the INS is asked to evaluate subjective intent also become significant. In IRCA, for example, immigration officials are called upon to determine whether an alien fraudulently procured a visa or entry into the United States. *See* 8 U.S.C.A. § 1182(a)(19). Immigration officials must also evaluate the claim of an alien seeking asylum in this country that he has a well-founded fear of persecution. *See* 8 U.S.C.A. §§ 1101(a)(42), 1158 (a), 1253(h) (West Supp. 1988).

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[7] In fact, the procurement or use of documentation would normally justify exclusion because of the concomitant fraudulent intent. *See* footnote 6, *supra*.

Despite the foregoing considerations, defendants argue that the statutory scheme does indeed support the reasonableness of their original policy. Specifically, they point to 8 U.S.C.A. § 1255a(a)(2)(B), applicable to aliens using non-immigrant visas, which provides that such an alien "must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date." From this provision, they contend that since the illegal status of an alien using a non-immigrant visa must become known to the Government before January 1, 1982 in order to establish the requisite continuity, the intent of an alien reentering this country after January 1, 1982 with a non-immigrant visa to remain permanently must similarly be known to the Government before the period of stay authorized by that later visa can be considered unlawful under § 1255a(a)(2)(A).

Fundamentally, this argument again reflects the erroneous premise that the sole illegality of an alien's presence following reentry, where the non-immigrant visa facially permits his presence, is that alien's fraudulent intent to ignore the limited duration of the visa and remain permanently. The statutory scheme crafted by Congress simply is not so limited. Once an alien acquires illegal status pursuant to the terms of § 1255a(a)(2)(B), then that status is not relinquished so long as the 45 day and 180 day limitations are satisfied. How the alien reentered the United States and what his intentions were at that time are not dispositive factors in the continuous unlawful calculus. The brief departure concession of § 1255a(g)(2)(A) cannot be read any other way.

Further undermining defendants' argument is the plain fact that it misreads § 1255a(a)(2)(B). That section states that aliens who used non-immigrant visas when entering

the United States may establish their illegal status either (1) by demonstrating that the stay authorized by the non-immigrant visa expired before January 1, 1982 "*or*" (2) by showing that their unlawful status – which may be acquired in ways other than overstaying the period of the visa – was known to the Government prior to January 1, 1982. *See* 8 U.S.C.A. § 1255a(a)(2)(B). Defendants' argument ignores the first alternative.

It is this Court's conclusion that the original regulation promulgated by the INS conflicts with the plain meaning of the statutory scheme. When it enacted § 1255a(g)(2)(A), Congress clearly intended that brief departures abroad would not break an established period of illegal residence in the United States. Section 1255a(g)(2)(A) makes no distinction between reentry by inspection and other forms of illegal reentry. Even the regulations established pursuant to the congressional mandate of § 1255a(g)(2)(A) fail to make such a distinction. *See* 8 C.F.R. § 245a.1(c)(1). Thus, what the INS' original policy did was to read one portion of the statute in a way that deprived another portion of its full intended effect. It is simply incorrect to interpret one provision of a statute in a way that essentially saps another provision of its vitality. *American Tobacco Co. v. Patterson,* 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *Richards v. United States,* 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the who Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law and to its object and policy.' ") (footnotes omitted); *Adams v. Howerton,* 673 F.2d 1036, 1040 (9th Cir.) ("[W]e strive to interpret language in one section

of a statute consistently with the language of other sections and with the purposes of the entire statute considered as a whole."), *cert. denied,* 458 U.S. 1111 (1982).

2. Legislative History of IRCA – When the plain meaning of a statutory scheme appears to settle the question presented, the Supreme Court has directed that the legislative history should be consulted to "determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca,* 480 U.S. __, 107 S.Ct. 1207, 1213 n.12 (1987) (quoting *United States v. James,* 478 U.S. 597, 106 S.Ct. 3116, 3125 (1986)). An examination of the legislative history reveals no indication of a congressional desire to distinguish between aliens reentering this country by inspection and those seeking to avoid inspection.

The reports of the various congressional committees analyzing IRCA indicate that the legalization provisions, including the brief departure exception, were designed to apply to all aliens. They do not in any way suggest a distinction between aliens who present documentation and those who do not. *See, e.g.,* H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5653 ("The Committee believes that the solution lies in legalizing the statuts [sic] *of aliens* who have been present in the United States for several years. . . .") (emphasis added). *See also id.* at 114, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5676, 5718. Moreover, President Reagan, when he signed IRCA into law, noted that "[d]istance has not discouraged illegal immigration to the United States from all around the globe. The problem of illegal immigration should not, therefore, be seen as a problem between the United States and its neighbors." Statement by President Ronald Reagan Upon Sign-

ing S.1200, 22 Weekly Comp. of Presidential Documents 1534 (November 10, 1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5856-1, 5856-4. Defendants have therefore failed to satisfy their burden of demonstrating a clearly established legislative intent contrary to the plain meaning of the statutory scheme.

B. Conclusion

The plain meaning of the statutory scheme and the legislative history demonstrate that the INS' initial policy, as manifested in 8 C.F.R. § 245a.2(b)(8), was inconsistent with Congress' intent when it enacted IRCA. Thus, although entitled to considerable deference, "there are limits, grounds in the language, purpose and history of the particular statute, on how far an agency properly may go in its interpretative role." *Int'l Bhd. of Teamsters v. Daniel,* 439 U.S. 551, 566 (1979). Moreover, the subsequent modification of § 245a.2(b)(8), although certainly not dispositive, is further indication that that policy may be questioned. *Cardoza-Fonseca,* 107 S.Ct. at 1221 n.30. Accordingly, it is the declaration of this Court that 8 C.F.R. § 245a.2(b)(8), until modified, was inconsistent with the provisions and policies of the Immigration Reform and Control Act of 1986.

C. Available Relief

The question of what relief is available to the plaintiffs who fall within subclass one is an exceedingly complex question. The Court has identified a number of issues which the parties have failed to address but which the Court deems determinative. As a result, the Court reserves judgment as to the relief requested by these plaintiffs and any factual questions attendant thereto pending further

briefing by the parties. The Court will frame the issues for the parties in a minute order to be issued along with this Order.

III. Modified Policy

As all parties acknowledge, an alien seeking an adjustment of status must be "admissible to the United States as an immigrant." 8 U.S.C.A. § 1255a(a)(4)(A). In order to qualify as admissible, an alien must not fall within one of the many categories Congress has determined justify exclusion. *See* 8 U.S.C.A. § 1182(a). One such category potentially forecloses legalization to those aliens who fraudulently procured a visa or entry into the United States. *See* 8 U.S.C.A. § 1182(a)(19). The Attorney General is, however, authorized by Congress to waive this basis for exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C.A. § 1255a(d)(2)(B)(i).[8]

Under defendants' modified policy, an alien who reentered the United States using a non-immigrant visa is excludable under § 1182(a)(19) because, by holding himself out as a nonimmigrant when in reality he was returning to an illegal residence in the United States, the alien would have fraudulently procured entry into the United States. Although the INS deems the alien to be excludable and thus potentially ineligible for an adjustment of status, the INS may waive this basis for exclusion. As a result, the INS, consistent with all other waivable grounds for excludability, requires those aliens to file an application for a waiver of excludability along with a $35 filing fee. *See*

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[8] Many of the other grounds for exclusion may not be waived. *See* 8 U.S.C.A. § 1255a(d)(2)(B)(ii).

8 C.F.R. §§ 245a.2(b)(9) and (b)(10).[9] Plaintiffs contend that this requirement is inconsistent with IRCA and that it violates the equal protection guarantee of the Fifth Amendment.

A. Reasonableness of Modified Policy

1. Plain Meaning of the Statutory Scheme—As it is currently formulated, § 1182(a)(19) provides that "the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . . (19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter." Thus, an alien will be excludable if, by fraud or willfully misrepresenting a material fact, he seeks, sought, or has procured any of four items: a visa, other documentation, entry into the United States, or any other benefit provided by the Act. Directly relevant to subclass two in this case is that portion of § 1182(a)(19) which renders excludable an alien who has procured entry into the United States by fraud. An alien reentering the United States under the ostensible authorization of a non-immigrant visa when in fact he is returning to his unlawful residence has fraudulently procured entry into the United States.

[9] According to 8 C.F.R. § 245a.2(b)(9), "[a]n alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence" may file for legalization. However, "[a]n alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) [§ 1182(a)(19)] as an alien who entered the United States by fraud." 8 C.F.R. § 245a.2(b)(10).

Faced with this relatively straightforward provision, plaintiffs in subclass two nevertheless argue that they are not excludable. They contend that § 1182(a)(19), as currently formulated, does not apply to them.

IRCA was passed on November 7, 1986. In its current form, however, § 1182(a)(19) was not passed until three days later, on November 10, 1986, as part of the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 8 U.S.C.A. § 1182(a)(19) (West Supp. 1988) hereinafter Marriage Fraud Amendments). It is therefore plaintiffs' position that IRCA contemplates application of the earlier version of § 1182(a)(19), and, according to that version, they are not excludable.[10] Plaintiffs therefore characterize the issue presented as whether the amendment of § 1182(a)(19) should be applied retroactively.

This Court has serious misgivings about the accuracy of plaintiffs' characterization. Restrictions on when a law may be applied retroactively are fundamentally predicated

[10] Prior to its amendment on Novenber 10, 1986, § 1182(a)(19) provided for exclusion for "[a]ny alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact." 8 U.S.C.A. § 1182(a)(19) (West 1970), *amended by*, 8 U.S.C.A. § 1182(a)(19) (West Supp. 1988). Significantly, the earlier version relates only to seeking to enter by fraud and not to entry in general. Thus, an alien who accomplished a fraudulent entry was only excludable at the time of entry and not upon completion of the entry. As one commentator noted, "[t]he Attorney General held that the first part of the 1952 Act, relating to fraud in documents, is both prospective and retrospective . . . but that the second portion, relating to misrepresentation in seeking entry, is prospective only." 1 C. Gordon, H. Rosenfield & S. Mailman, *Immigration Law and Procedure* § 2.37, at 2-267 (1988). Consequently, an alien who lawfully obtained a non-immigrant visa would have been excludable at the time he fraudulently reentered the United States; but, having accomplished the entry, the alien was no longer excludable under § 1182(a)(19).

upon notions of fairness to one who has a vested right or has acted in accordance with the law as it existed at the time of the action. *See NLRB v. St. Luke's Hospital Center,* 551 F.2d 476, 484 (2d Cir. 1976). In this case, both the passage of IRCA and the Marriage Fraud Amendments predated the commencement of the legalization application period by roughly six months. Moreover, it is not insignificant that only three days separated passage of the two Acts or that IRCA was signed by President Reagan on the same day that the Marriage Fraud Amendments passed in Congress. It might therefore be argued that since the two statutes were acted upon by the same congressional committees simultaneously and were passed contemporaneously, there is no question of retroactivity in this case.

Even assuming the question of retroactivity must be confronted, we are here concerned with *illegal* aliens and thus at no time did plaintiffs act in accordance with the law, only to see the law changed subsequently. Both before *and* after the passage of the amended version of § 1182(a)(19), plaintiffs were acting contrary to the laws of this Nation. This case does not involve suddenly making an action illegal that was, at the time of its commission, legal. Nor can it be said that a benefit, once conferred, is improperly being revoked, for the benefit at issue—amnesty—did not become available until May 5, 1987. *See generally Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913) ("[A] retrospective operation will not be given to a statute which interferes with *antecedent rights* . . . unless such be the 'unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' ") (citations omitted and emphasis added); *City of Great Falls v. U.S. Dept. of Labor,* 673 F.2d 1065, 1069 (9th Cir. 1982) ("[T]he issue is whether application of the new law would infringe upon or deprive a

person of a right that had *matured or become unconditional.*' ") (citations omitted and emphasis added).

Plaintiffs do not deny that Congress may provide that the amendment of § 1182(a)(19) be applied retroactively. *See Greene v. United States,* 376 U.S. 149, 160 (1964); *Menhorn v. Firestone Tire & Rubber Co.,* 738 F.2d 1496, 1504 (9th Cir. 1984). Instead, they assert that Congress expressly chose not to apply the amendment retroactively. The question of whether § 1182(a)(19) as amended should apply to this case is therefore one of statutory construction. *United States v. Kimberlin,* 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied,* 476 U.S. 1142 (1986).

The relevant congressional statement appears at § 6(b) of the Marriage Fraud Amendments. That provision states that the amendment applies "to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment of this Act based on fraud or misrepresentations occurring before, on, or after such date." *See* Marriage Fraud Amendments, Pub. L. No. 99-639, § 6(b), 100 Stat. 3537, 3544 (1986). According to plaintiffs, legalization applicants are not seeking "admission" to the United States because admission relates to the entry of an alien, and "entry" is defined by statute as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession. . . ." 8 U.S.C.A. § 1101(a)(13).

Plaintiffs' argument completely ignores the statutory terms utilized by Congress when it enacted IRCA. Both the temporary and permanent residence provisions of IRCA provide that when certain conditions are met, "[t]he Attorney General shall adjust the status of an alien to that of an alien lawfully *admitted* for temporary residence. . . ." *See* 8 U.S.C. § 1255a(a) (emphasis added). *See also* 8 U.S.C.A. § 1255a(b). Adjustment of status is therefore equated with admission under the statutory scheme itself.

Cf. 2 C. Gordon, H. Rosenfield & S. Mailman, *Immigration Law and Procedure* § 7.7e, at 7-104 (1988). Moreover, as was previously noted, IRCA expressly requires that an alien must establish that he is "admissible to the United States as an immigrant" in order to obtain an adjustment of status. *See* 8 U.S.C.A. §§ 1255a(a)(4)(A), 1255a(b)(1)(C)(i). Finally, when it provided that § 1182(a)(19) was a waivable ground for exclusion, Congress phrased that provision in terms of "the determination of an alien's *admissibility*." 8 U.S.C.A. § 1255a(d)(2) (emphasis added). Thus, the statutory framework itself is strong evidence that Congress did not equate admission or admissibility merely with entry, for the basic requirement of IRCA was that an alien have entered the United States well before the question of admissibility would be determined. If Congress had meant "entry" when it said "admission," it surely could and would have said so.

It is also evident that plaintiffs' restrictive interpretation of the term "admission" as used in § 6(b) is inconsistent with the statutory framework of the Marriage Fraud Amendments. The primary purpose of that enactment was to create a two year conditional residence status for those aliens who were previously admitted for permanent residence. *See* 8 U.S.C.A. § 1186a (West Supp. 1988). That conditional status was intended to facilitate the identification of those marriages that were "improper" because they were merely ploys to assist the alien's illicit immigration into the United States. Consistent with this purpose, the amendment of § 1182(a)(19) permits this past fraud to be considered a basis for exclusion. The Marriage Fraud Amendments thus plainly contemplate that the alien had already entered the United States at least two years earlier. Consequently, plaintiffs are simply incorrect when they ascribe such a narrow meaning to the term "admission" as it is used in § 6(b).

2. Legislative History—The legislative history of the Marriage Fraud Amendments in no way contradicts this conclusion. For example, the House Judiciary Committee Report states that one function of the Amendments would be to "prevent[ ] aliens undergoing any administrative or judicial proceeding concerning their right to enter *or remain* in the United States from obtaining an immediate benefit on the basis of a marriage occurring during that period of time." H.R. Rep. No. 906, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5978, 5979 (emphasis added). Similarly, in a letter to the chairman of the House Judiciary Committee, the Justice Department noted that the conditional status created by the amendments would apply to "aliens who marry *following* entry on a nonimmigrant fiance visa." Letter from John R. Bolton, Asst. Att'y Gen. to Rep. Peter W. Rodino, Jr., Chairman, House Comm. on the Judiciary (July 31, 1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5978, 5980.

In view of the foregoing, the INS' modified policy requiring the filing of waiver applications is entirely consistent with congressional enactments.[11] It must be noted, however, that the INS need not even satisfy so stringent a test. All the INS must do is satisfy this Court that the challenged regulations are reasonable—*i.e.*, based upon a permissible construction of the statute—and thus not arbitary and capricious, irrespective of whether this Court

[11] This conclusion is not in any way inconsistent with the Court's ruling regarding the first subclass. When Congress expressly provided that brief absences would not break an alien's continuous residence, it was inconsistent with that policy to enact regulations which *completely* deny this benefit to a class of aliens obviously known to Congress. This does not mean, however, that the INS, *consistent with congressional policy* as manifested in § 1182(a)(19), may not impose a *condition* upon that benefit.

would have independently arrived at this particular interpretation of the statute. *Chevron*, 467 U.S. at 843 n.11. *See also Young v. Community Nutrition Institute*, 476 U.S. 974, 106 S.Ct. 2360, 2365 (1986); *Fernandez v. Brock*, 840 F.2d 622, 633-34 (9th Cir. 1988).

B. Equal Protection

Plaintiffs present an additional challenge to the INS' modified policy, asserting that it constitutes a violation of the equal protection guarantee of the Fifth Amendment. Specifically, they argue that because the modified policy requires that a waiver application be filed by all aliens whose reentry into the United States was documented on INS Form I-94, they are impermissibly treated differently than similarly situated Canadian and Mexican applicants for legalization. This distinction arises because the INS permits Canadian and Mexican citizens to enter the United States using only non-immigrant visas and without the necessity of obtaining I-94 documentation.

It is well-established in Fifth Amendment jurisprudence that aliens, even those whose presence here is illegal, are entitled to equal protection of the laws. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). However, it has also been consistently emphasized by the Supreme Court that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). Thus, "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments [is] largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). *See also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). "[I]t is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Fiallo*, 430 U.S. at 799.

When the federal government establishes classifications among aliens pursuant to immigration laws, those classifications " 'need only be supported by some rational basis to fulfill equal protection guarantees.' " *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980) (citations omitted).[12] According to defendants, they do not seek to confer any special privileges upon certain aliens whose countries of origin are contiguous with the United States, since any alien from Mexico or Canada who could be shown to have fraudulently entered the United States would also be required to seek a waiver of excludability. Instead, aliens who entered the United States and who were issued I-94 documentation, unlike those who were not, are prima facie excludable at the time they apply for legalization.

In order to qualify for legalization, an alien must be returning to an unrelinquished unlawful residence in this country. However, this also means that the alien, by obtaining a Form I-94, fraudulently entered the United

[12] Without developing the argument, plaintiffs suggest that *Plyer v. Doe*, 457 U.S 202 (1982), stands for the proposition that a middle level of scrutiny, somewhere between strict scrutiny and the rational basis test, should apply in this case. Plaintiffs' reliance on *Plyer* is misplaced. The Court in *Plyer* repeatedly stressed the plenary authority of the federal government with respect to immigration and expressly contrasted this with the more limited authority of the states in this area. *See Plyer*, 457 U.S. at 225. Thus, at best, *Plyer* may be said to stand for the proposition that *state* distinctions among aliens are judged by some heightened degree of scrutiny. The vast federal power over immigration forecloses such an argument where, as here, we are concerned with federal law. *See id.*

States and is therefore excludable pursuant to § 1182(a)(19). By contrast, the INS cannot be certain at the outset whether those aliens who were not issued a Form I-94 fraudulently entered the United States and consequently do not require them automatically to submit waiver requests with their legalization applications.

This policy is completely rational and thus satisfies the requirements of the Fifth Amendment. *See Fiallo,* 430 U.S. at 797-99 (upholding federal law granting immigration preferences to legitimate children); *Alvarez v. District Director of U.S.I.N.S.,* 539 F.2d 1220, 1224 (9th Cir. 1976) (upholding special immigration privileges for Canadian and Mexican aliens), *cert. denied,* 430 U.S. 918 (1977).

C. Conclusion

In view of the foregoing analysis, plaintiffs' challenge to the modified policy adopted by the INS and codified at 8 C.F.R. §§ 245a.1(b)(9) and (b)(10) is without merit. Accordingly, summary judgment on this issue shall be entered in favor of defendants.

IT IS SO ORDERED.

DATED: July 15, 1988.

/s/ William D. Keller
WILLIAM D. KELLER
United States District Judge

Supreme Court of the United States

No. 91-1826

WILLIAM P. BARR,
ATTORNEY GENERAL, ET AL., PETITIONERS

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

ORDER ALLOWING CERTIORARI.
Filed June 22, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

June 22, 1992

No. 91-1826

FILED
AUG 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Did the district courts properly entertain these lawsuits brought by aliens seeking adjustment of status, which challenge the regulations of the Immigration and Naturalization Service (INS) articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering INS to extend that deadline?

PARTIES TO THE PROCEEDINGS

Respondents in the first case are Catholic Social Services, Inc.; National Center for Immigrant Rights, Inc.; United-California Mexican American Associations; American Federation of Labor-Congress of Industrial Organizations; United Farm Workers of America, AFL-CIO; La Communidad de San Juan; Sara Orantes de Palacios; Mercedes Aguilar de Lopez; Maria Teresa Reyes; Jose Guerroero Saravia; Efren Gonzales; Lorenza Sanchez Benuto; Carlos Alberto Medina; Benjamin Chavez; Sergio Will; Eva Garcia de Soto; and Petra Estrada de Vasquez.

Respondents in the second case are League of United Latin-American Citizens; American G.I. Forum; Hermandad Mexicana Nacional; Los Angeles County Federaltion [*sic*] of Labor, Legalization Assistance Project (AFL-CIO); United California Mexican-American Association; International Institute (San Francisco); John Doe; Raul Berumen-Flores; Martha Berumen; Mario Villa; and Martin Nava.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 956 F.2d 914. The opinions of the district courts (Pet. App. 22a-28a, 40a-49a, 50a-60a) are unreported. A related opinion of the court of appeals in the first case is reported at 820 F.2d 289. A related opinion of the district court in the first case (J.A. 54-77) is reported at 685 F. Supp.

1149. A related unreported opinion of the court of appeals in the first case appears at J.A. 27-47. Related unreported opinions of the district court in the first case appear at J.A. 14-17, 21-25, and 48-53. A related unreported opinion of the district court in the second case appears at J.A. 211-234.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The petition for a writ of certiorari was filed on May 13, 1992. This Court granted the petition on June 22, 1992. J.A. 235. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a is set forth at Pet. App. 99a-119a.

2. 5 U.S.C. 702, 703, and 704 are set forth at Pet. App. 120a-121a.

3. 8 C.F.R. Pt. 245a is set forth in the Appendix, *infra*, 1a-92a.

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency. See 8 U.S.C. 1255a. IRCA permitted aliens to apply to INS to adjust their status to that of an alien lawfully admitted for temporary residence. *Ibid.* The statute set out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the

United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); (3) admissibility to the United States as an immigrant; and (4) that they filed an application during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] 8 U.S.C. 1255a(a).

A key concern of IRCA was to ensure that the adjustment program was limited to a finite period and proceeded in an expeditious manner. Accordingly, as noted above, an express condition for eligibility, set forth in Section 1255a(a)(1), limited relief to aliens who applied in a timely manner; Section 1255a(f)(2) provides that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." Section 1255a(f) also established the process for judicial and administrative review of adjustment determinations based on factors other than a lack of timeliness. First, paragraph (1) of Section 1255a(f) makes the statutory procedures exclusive, by providing that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review." Finally, paragraph (4) provides that judicial review will be available "only in

[1] The Attorney General extended the program as long as possible, designating the twelve-month application period to begin on the last permissible day, May 5, 1987, and to continue through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

the judicial review of an order of deportation under [8 U.S.C. 1105a]."

In response to IRCA, INS adopted several regulations delineating the process of administrative review contemplated by the statute. First, INS required aliens to file an application either at one of INS's legalization offices, or with a "qualified designated entity" authorized to receive applications. 8 C.F.R. 245a.1(j), .1(r), and .2(e); see 8 U.S.C. 1255a(c)(1) and (2).[2] The regulations gave detailed guidance regarding the types of documentation aliens could use to prove their eligibility for relief, 8 C.F.R. 245a.2(d), and, with limited exceptions, required an immigration officer to interview each applicant. Section 245a.2(j). The initial decisions with respect to the applications were made by the directors of INS's regional processing facilities. Section 103.1(t). Those officers were required to notify the applicants of decisions in writing, explain the specific reason for denials, and advise the applicants of their right to appeal. Sections 103.3(a)(3), 245a.2(o). Finally, pursuant to Sections 103.1(f)(1)(xxvii) and 245a.2(p), applicants had thirty days to appeal the decision of the regional processing facility to the Associate Commissioner, Examinations (Administrative Appeals Unit).

Because 8 U.S.C. 1255a(f)(3) provides that there can be only "a single level of administrative appellate review," and Section 1255a(f)(4) provides that ju-

[2] In the case of an application filed with a qualified designated entity, the application was deemed filed with the legalization office on the date it was filed with the qualified designated entity, provided that the applicant consented to the entity's forwarding the application to the legalization office. 8 C.F.R. 245a.2(f).

dicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]," an unsuccessful applicant can challenge the Associate Commissioner's decision only after the conclusion of administrative deportation proceedings. Under 8 U.S.C. 1105a, an applicant may appeal a final adverse decision in a deportation proceeding to the appropriate regional court of appeals, in accordance with the provisions of 28 U.S.C. 2342-2350. See 8 U.S.C. 1105a (incorporating the provisions of 28 U.S.C. 2342-2350 by reference).

The legalization programs attracted "amnesty" applications on an unprecedented scale. Over three million applications were filed, 1,763,381 of which were seeking adjustment of status under Section 1255a.[3] More than 99% of those applications have been processed, with approximately 94% of the processed applications being approved.[4]

2. The matter before the Court involves two consolidated cases challenging two different INS regu-

[3] Those statistics do not include filings made after the deadline by members of the respondent classes.

[4] INS has advised us that as of June 27, 1992 it had granted relief in 1,645,862 of the 1,750,530 applications for adjustment of status that it had completed processing as of that date. These statistics reflect slightly fewer applications than the statistics the government provided to the Court at the time of *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), see Gov't Br. 4 & n.3, No. 89-1332 (Oct. Term, 1990). This decrease is attributable to the withdrawal of applications for a variety of reasons. For example, some applicants received other immigration benefits not dependent on adjustment of status, some applicants died, and some filed duplicate applications under both programs.

lations interpreting the statutory requirements for eligibility for adjustment of status.

a. The first case involves Section 1255a(a)(3), which provides that an alien generally is not eligible for adjustment under IRCA unless he has remained in this country continuously since November 6, 1986. Section 1255a(a)(3)(B) mitigates this requirement by providing that an alien should not be considered to have failed to maintain continuous physical presence in the United States solely because of "brief, casual, and innocent absences from the United States." Shortly after IRCA was passed, INS interpreted this provision to exclude any absences not authorized by INS in advance, on the theory that absent INS permission, the alien's reentry after the absence was unlawful and thus not "innocent." See 52 Fed. Reg. 16,208-16,209 (1987) (codified at 8 C.F.R. 245a.1(g)).

On November 12, 1986, respondents Catholic Social Services, Inc. and other organizations and individuals interested in INS's interpretation of the "brief, casual, and innocent absences" provision commenced an action in the United States District Court for the Eastern District of California. J.A. 1. On November 24, 1986, the district court certified a class including all persons believed by the government to be deportable who could establish a prima facie claim for adjustment of status. *Id.* at 14-17.[5] On the same

[5] The description in the text refers to the first of two subclasses certified by the court. The district court also certified a second subclass of aliens seeking relief under the Special Agricultural Worker program established by 8 U.S.C. 1160, see J.A. 15, but issues concerning those aliens are not before this Court. The district court finally resolved those claims in an August 11, 1988 order, see *id.* at 3 (docket entry 188), and neither party appealed to the court of appeals.

day, the district court issued a temporary restraining order (*id.* at 21-25) barring INS from deporting any member of the class who would have been prima facie eligible for legalization under IRCA except for a "brief, innocent and casual unauthorized departure." *Id.* at 22.

The government appealed, and the court of appeals reversed. J.A. 27-47. The court noted that a temporary restraining order is not "[o]rdinarily * * * an appealable order," *id.* at 31, but concluded that "the substance of the proceeding" in the district court justified characterization of the district court's order as an appealable preliminary injunction, explaining that the order went "beyond merely preserving the status quo and impair[ed] [INS's] ability to control the borders and prevent illegal immigration." *Id.* at 32-33. On the merits, the court of appeals concluded that the district court erred in issuing the temporary restraining order because the "Attorney General has presented us with a reasonable construction of the IRCA," and "[t]he district court therefore abused its discretion by concluding CSS was likely to succeed on the merits." *Id.* at 41.[6]

After further proceedings in the district court, the district court narrowed the class certification (J.A. 48-53) to include only "persons prima facie eligible for legalization * * * who departed and reentered the United States without INS authorization * * * following what they assert to have been a brief, casual and innocent absence from the United States." *Id.* at 50. In May 1988, notwithstanding the court of

[6] The court of appeals subsequently vacated this opinion, when INS withdrew the challenged regulation. 820 F.2d 289 (1987).

appeals' opinion regarding the temporary restraining order, the district court granted summary judgment to respondents and enjoined INS from enforcing its administrative interpretation. *Id.* at 54-77.

Turning to remedial issues, the court issued an opinion on June 10, 1988 (Pet. App. 22a-28a), requiring INS to identify all members of the class whose applications were denied on the basis of the challenged regulation, to "rescind such denials * * * and readjudicate such applications in a manner consistent with the court's order." *Id.* at 24a. Moreover, the court required INS, notwithstanding the statutory cutoff for acceptance of applications, to continue until November 30, 1988 to accept adjustment applications from class members who claimed that "they knew of [INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application." *Id.* at 25a.[7]

In response to this Court's June 17, 1988 decision in *INS* v. *Pangilinan*, 486 U.S. 875, the government filed a motion to vacate that portion of the district court's decision extending the filing deadline established by Congress.[8] After further briefing, the district court denied the motion. Pet. App. 40a-49a. Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," *id.* at 42a n.2, the court concluded that it had power to extend the statutorily imposed deadline. Although it "recognize[d] that there is dicta in [*Pangilinan*] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose." *Id.* at 42a.

Noting the possibility that it might be incorrect in its narrow reading of *Pangilinan*, the court also entered an alternative injunction, to become "effective immediately upon the reversal of [the court's earlier] order." The alternative order effectively required petitioners to allow the challenged class members to remain in this country indefinitely. See Pet. App. 42a-43a (petitioners "will be barred from excluding deporting, or subjecting to voluntary departure any [class] members * * * and must grant such aliens work authorizations"). Paragraphs 3(a) through 3(g) of the same order establish detailed procedures for implementation of this alternative injunction. See Pet. App. 43a-49a.

b. The second case concerns 8 U.S.C. 1255a(a)(2), which provides that an alien is not eligible for relief under IRCA unless he has resided continuously in this country in an unlawful status since before January 1, 1982. INS interpreted this provision to mean that an alien who left the United States and then reentered using a facially valid nonimmigrant visa or other documentation was not eligible for re-

[7] The court also issued a supplemental order on August 11, 1988 requiring INS to advise individuals in its custody of any rights they might have under the district court's prior orders. Pet. App. 29a-33a.

[8] On June 24, 1988, while it was considering the government's motion, the district court entered a stay of the government's obligation to accept and dispose of applications, requiring the government instead to refrain from deporting or otherwise removing any individuals who were members of the class. Pet. App. 34a-39a. The district court vacated the stay when it rejected the motion on August 11, 1988. See *id.* at 43a.

lief, because the use of facially valid documentation made the subsequent residence lawful for purposes of this section of IRCA. See 8 C.F.R. 245a.2(b)(8).[9]

In July 1987, respondents League of United Latin American Citizens and various individuals brought an action challenging the regulation in the United States District Court for the Central District of California. See Pet. App. 8a. Although INS withdrew the challenged regulation in October 1987,[10] the suit continued, and the district court certified a class of individuals who were deemed ineligible for relief solely because of the challenged policy and, "relying upon information that they were ineligible, did not apply for legalization [on or] before the May 4, 1988 deadline." See J.A. 215-216. In July 1988 the district court held that the original INS policy had been invalid. *Id.* at 211-234.

Finally, in August 1988 the court issued a remedial order (Pet. App. 50a-60a), requiring that until November 30, 1988, INS would continue to accept applications for relief from aliens who claimed that they would have applied for relief in a timely manner but

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[9] On its face, 8 C.F.R. 245a.2(b)(8) states that an alien will remain eligible for relief as long as his reentry was "not documented on Service Form I-94, Arrival-Departure Record." This has the effect of barring relief for aliens who entered with facially valid documents, because their entry would have been documented on an I-94.

[10] INS altered the regulations by issuing 8 C.F.R. 245a.2(b)(9) and (10). Subparagraph (9) provides that an alien is eligible for relief even if his entry is noted on the I-94, but subparagraph (10) conditions this on the alien's securing a waiver of the provision in 8 U.S.C. 1182(a)(19) that requires exclusion of aliens who enter the United States by fraud. See Pet. App. 8a-9a.

for INS's interpretation of the "continuous unlawful residence" provision. The district court noted that the application requirement is "a jurisdictional requirement and not simply a statute of limitations," *id.* at 52a, and thus agreed with the government that the time period could "not be equitably tolled," *id.* at 53a. The court also noted that equitable tolling would be unavailable because of respondents' failure "to demonstrate affirmative misconduct by the INS," *ibid.*, explaining that "malfeasance * * * cannot be presumed simply because the INS promulgated regulations which have been held to be invalid," *id.* at 54a. Nevertheless, the district court concluded that it had the power to extend the deadline, on the theory that the Attorney General effectively had failed to designate a twelve-month period by promulgating incorrect regulations during the designated period. *Id.* at 55a-56a.

3. Although the government determined not to challenge the two district court rulings rejecting INS's interpretations of IRCA, it nevertheless appealed both cases to the Ninth Circuit. The appeals challenged both the district courts' authority to entertain the cases and to grant relief extending the statutory cutoff for filing applications.[11] Pursuant to an expedited scheduling order, the court heard oral argument in the *CSS* case on November 18, 1988.[12]

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[11] Because INS had ceased to enforce the challenged regulations, it did not challenge application of the district court orders to individuals who had filed timely applications, who would have been able to secure the same relief granted by the district courts on appellate review. See Gov't C.A. Br. 3, 9 n.3.

[12] After issuing three temporary stays in the *CSS* case, see Pet. App. 94a, 95a, 96a, the court of appeals issued an order on September 20, 1988 (*id.* at 97a-98a), partially granting the

The court of appeals held the case pending this Court's disposition of *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and finally rendered a decision more than three years after argument, on February 13, 1992.

a. The court first rejected the government's argument that 8 U.S.C. 1255a(f) precluded district court jurisdiction over the two cases.[13] Pet. App. 10a-15a. The court of appeals relied heavily on this Court's decision in *McNary*, which involved similar provisions of IRCA related to relief for agricultural workers. The court reasoned that *McNary* limited the effect of Section 1255a(f) to "denials of *individual* * * * applications," Pet. App. 12a. Because this case did not involve an individual application, but a class-wide challenge to the standards to be applied to in-

government's motion for a stay pending appeal. The order incorporated by reference the terms of a temporary stay issued by the *CSS* district court on June 24, 1988, see note 8, *supra*. The court subsequently consolidated the *LULAC* case with the *CSS* case and accepted briefs in the *LULAC* case without ordering further arguments.

[13] As the court of appeals noted, the district court in the *LULAC* case did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. See Pet. App. 10a n.3. This Court's decision in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-388 (1978), however, establishes that the separate-judgment requirement can be waived. The court of appeals correctly concluded that the requirement in fact was waived in this case, because "both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal." Pet. App. 10a n.3. In any event, even if this requirement had not been waived, the court of appeals still would have had jurisdiction over the appeal in the *CSS* case, which adequately presents the questions raised by the petition. Respondents did not challenge this point in their brief in opposition to the petition.

dividual applications, the court concluded that jurisdiction was available under *McNary*. *Id.* at 14a. The court acknowledged that the District of Columbia Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), petition for cert. pending, No. 91-1924, had read *McNary* to give Section 1255a(f) a much more preclusive effect—barring judicial review of any issues "that go to the heart of an applicant's claim," even if presented on a "class-wide" basis, as in this case. Pet. App. 15a (quoting *Ayuda*, 948 F.2d at 749). The court of appeals nevertheless "decline[d]" to "follow the D.C. Circuit's * * * decision." Pet. App. 14a.

b. The court of appeals also rejected the government's argument that *Pangilinan* barred the district courts from extending the application deadline. Pet. App. 15a-19a.[14] In the Ninth Circuit's view, *Pangilinan* could be distinguished on several grounds: *first*, that the remedy imposed here was not naturalization, but simply an order requiring INS to consider applications for adjustment of status, *id.* at 16a-17a; *second*, that, "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress," *id.* at 17a[15]; and *third*, that *Pangilinan* had been influ-

[14] Because the court of appeals upheld the district court's direct extension of the deadline, it did not consider whether to uphold the district court's alternative injunction (described at page 9, *supra*), which indirectly accomplished the same result by prohibiting INS from deporting aliens who filed untimely applications and by requiring it to grant them work authorizations. See Pet. App. 7a.

[15] The court stated that the deadline at issue in *Pangilinan* had been part of the statute, and suggested that IRCA differed because "Congress did not provide a specific cutoff date for amnesty applications [in IRCA]." Pet. App. 18a.

enced by subsequent legislative developments indicating that Congress would not have approved of an extension of the deadline. The court noted contrasting circumstances in this case, where the comments of a Senator debating a subsequent bill suggested that Congress would have approved of a judicial extension of the deadline. *Id.* at 18a-19a.

c. Because the long delay in deciding the cases had allowed the initial time period set forth in the district courts' injunctions to expire, the court of appeals remanded the cases to the district courts to provide a further extension of the application period, equivalent to the periods originally ordered. Pet. App. 19a.[16]

SUMMARY OF ARGUMENT

1. Section 1255a(f)(1) precludes district court review of "a determination respecting an application for adjustment of status." A determination of the substantive requirements for granting an application is just such "a determination respecting an application for adjustment of status." Accordingly, Section 1255a(f)(1) bars review by the district courts of the

[16] The government filed a motion (Pet. App. 61a-98a) seeking an order staying the government's obligation to continue accepting applications pending disposition of this petition, but the court of appeals instead stayed the mandate, leaving in place the existing stays, discussed in note 12, *supra*. Since this Court granted the government's petition for a writ of certiorari, the government has asked the court of appeals to issue the mandate, so that the six-month period finally can begin running. Even if the period runs before this Court resolves the case, the case will not become moot, because the decision in this case will resolve whether INS must grant relief to aliens who applied after the statutory deadline, but before the judicial deadline.

consistency of such regulations with Section 1255a. Review is available "only in the judicial review of an order of deportation under [Section 1105a]." Section 1255a(f)(4)(A).

Applying Section 1255a to bar district court review of substantive regulations is consistent with both traditional principles of administrative law and this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). Ordinarily, individuals seeking relief from administrative agencies cannot challenge the agency's views regarding the requirements for relief until they seek relief through appropriate administrative proceedings. This Court has, however, allowed direct challenges in district court when necessary to preserve some avenue for judicial review of administrative action, especially when the action is alleged to violate the Constitution. Conversely, when Congress has created an adequate opportunity for judicial review, and declared that opportunity to be exclusive, there is no need (or justification) to find alternate means of review. This is especially so when the substance of the claim is that an agency determination that would result in an incorrect denial of relief justifies the claimant in foregoing the administrative process altogether so that he effectively can obtain judicial relief without entering the administrative process at all.

Applffiication of these principles shows that the district courts should not have entertained these cases. As a practical matter, respondents sought a declaration that INS regulations regarding the requirements for adjustment of status were incorrect. Furthermore, the statute provides for meaningful judicial review by allowing applicants to challenge application of the regulation to their individual fact

situations in the court of appeals. Finally, because the record produced in the administrative proceeding would contain all of the information relevant to respondents' claims, there is no need for the fact-finding capacities of the district courts.

Allowing respondents to proceed in district court makes a mockery of the procedures required by Section 1255a. This judicially sanctioned bypass upsets the carefully delineated scheme for judicial review Congress set forth in IRCA. As summarized above, IRCA was designed to provide one certain path for litigation with respect to eligibility for adjustment of status. Allowing respondents to maintain these class actions in the district courts eviscerates the congressional policy enacted with clarity in Section 1255a(f) by creating a second means of judicial review that bypasses adjudication by the expert administrative agency and thus gives the individual members of the respondent classes a choice of forum inconsistent with the statute.

2. The court of appeals also erred in granting relief to individuals who did not file applications for relief in a timely manner. Section 1255a(a) establishes four substantive requirements for relief. The first is that the individual file an application before a date certain. Section 1255a(a)(1). The individual members of the respondent classes did not do so. Accordingly, even if they would have been entitled to relief had they sought adjustment of status in a timely manner, they do not, and cannot, fall within the class for whom Congress authorized adjustment of status.

Respondents cannot evade this result by suggesting that the district court order is akin to equitable tolling. The doctrine of equitable tolling does not au-

thorize a court to ignore the substantive requirements for relief enacted by Congress. Moreover, equitable tolling is not justified simply by an agency's expression of views that would lead to the denial of relief. The customary way to proceed in such a situation is to seek relief and challenge the agency's denial of relief through appropriate mechanisms for administrative and judicial review. Respondents' failure to comply with the statutory requirements for relief should not be altered by judicial order.

ARGUMENT

I. DISTRICT COURTS DO NOT HAVE THE AUTHORITY TO REVIEW A CHALLENGE TO AN INS RULE REGARDING THE BASIS FOR GRANTING ADJUSTMENT OF STATUS.

Section 1255a(f)(1) of Title 8, United States Code, provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." The only provision of Section 1255a(f) providing for judicial review is Section 1255a(f)(4)(A), which allows "judicial review * * * only in the judicial review of an order of deportation under [8 U.S.C. 1105a]." Section 1105a, in turn, provides for review only in the courts of appeals. Accordingly, if respondents' claims challenge a "determination respecting an application for adjustment of status," the district courts erred in entertaining these cases.

A. A Rule Establishing the Basis for Granting Adjustment of Status Is a "[D]etermination [R]especting an [A]pplication for [A]djustment of [S]tatus" for Purposes of 8 U.S.C. 1255a(f)(1).

Contrary to the court of appeals' conclusion, a fair reading of the language of Section 1255a suggests that respondents' claims are barred by Section 1255a (f)(1). Section 1255a(g)(1)(B) required the Attorney General to "prescribe * * * such * * * regulations as may be necessary to carry out [Section 1255a]." In response to this requirement, the Attorney General adopted a number of regulations delineating the qualifications for adjustment of status. In these cases, respondents challenge the determinations reflected in two of those regulations, 8 C.F.R. 245a.1(g) and 245a.2(b)(8). A regulation concluding that relief is unwarranted in a particular fact pattern falls squarely within the normal usage of the term "determination." See, *e.g.*, *Webster's Third New International Dictionary* 616 (1986) (defining "determination" as "the act of deciding definitely and firmly esp[ecially] regarding a course of action"). Because the regulations would determine whether or not an application for relief would be granted, each of them is a determination "respecting" an application. See, *e.g.*, *id.* at 1934 (defining "respecting" as "in view of: * * * with regard or relation to").[17] Accordingly, the determination that members of the respondent classes are not eligible for relief is covered by Section 1255a(f)(1) and thus is not subject to challenge in the district courts.

[17] The definition suggests that "respecting" has a meaning similar to that of the phrase "relating to." As this Court has emphasized, "[t]he ordinary meaning of these words is a broad one." *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Compare *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (noting the broad meaning of the word "respecting" in the Establishment Clause of the First Amendment).

This reading is reinforced by a comparison of the language of Section 1255a(f)(1)—which refers to a "determination respecting" an application—with the phrasing used elsewhere in Section 1255a(f). The provision granting judicial review, Section 1255a(f)(4)(A), makes a narrower reference to a "denial" of an application, as does the provision precluding judicial review for a "denial" based on late filing, Section 1255a(f)(2).[18] It is natural to conclude that the broader reference to "determination" in Section 1255a(f)(1) should be applied more broadly. The result is straightforward: Section 1255a(f) provides for a single avenue of judicial review of any "determination respecting an application," Section 1255a(f)(1), namely, a challenge to a "denial * * * in the judicial review of an order of deportation," Section 1255a(f)(4)(A). If Congress had intended Section 1255a(f)(1) to bar nothing more than challenges to denials of applications, as the court of appeals seems to suggest, it would have used the term "denial," as it did elsewhere in Section 1255a(f).

[18] Another analogous reference appears in Section 1255a(f)(3)(A), which requires the Attorney General to establish a single level of administrative appellate review of a "determination described in [1255a(f)(1)]." As noted above, the Attorney General has provided for that review by allowing appeal to the Associate Commissioner for Examinations within 30 days of the denial of the application, which applies the regulatory determination to a particular application and thus provides a concrete dispute suitable for review.

B. Traditional Principles of Administrative Review Require Challenges to Administrative Rules Regarding Entitlement to Relief to Await an Administrative Determination on the Facts of a Particular Case, Especially When Adequate Judicial Review of That Determination Is Available.

As this Court has explained, general principles of administrative law counsel strongly against allowing individuals who disagree with the policies of government agencies to challenge those policies in district court before the policies actually have been applied to their cases. For example, considering an Administrative Procedure Act challenge to a broad government policy, this Court has explained that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990); see *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164-166 (1967).

On the other hand, the Court also follows a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991); see *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption carries special weight when the claims in question rest on the Constitution. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). The Court has not, however, treated the presumption that there must be *some* form of judicial review as a license for courts to fashion whatever form of judicial review might seem most expedient from the

perspective of the claimant. On the contrary, the general rule is that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see 5 U.S.C. 704 (Administrative Procedure Act provides for judicial review only in cases for which "there is no other adequate remedy in a court").

The interplay among these principles is illuminated by comparing this Court's decisions in *McNary* and *Heckler* v. *Ringer*, 466 U.S. 602 (1984). In *Heckler*, the Court refused to allow a direct suit in federal district court by an individual who believed he was entitled to reimbursement for the costs of a certain medical procedure under Title I of the Medicare Act, 42 U.S.C. 101 *et seq.*, and instead required the individual to submit a claim through ordinary administrative procedures, even though the Secretary already had promulgated a formal ruling barring compensation for that procedure. See 466 U.S. at 620-626.[19] Although Ringer, like the individual re-

[19] *Heckler* of course involved the Medicare Act rather than IRCA, but there is no reason why this should lessen the force of its statement of general principles of administrative law. The Medicare Act creates a jurisdictional scheme similar to that of IRCA, restricting review of "any claim arising under" that Act, 42 U.S.C. 405(h), much like IRCA restricts review of any "determination respecting an application." As this Court has recognized in interpreting the even narrower language of 8 U.S.C. 1105a, which provides exclusive review for any "final order of deportation," these phrases typically are construed to include not only the final administrative order, but also earlier subsidiary determinations that bear significantly on the ultimate decision on an application. See *Foti* v.

spondents in this case, had not yet sought relief in administrative proceedings and couched his claim as a challenge to a general administrative determination, the Court concluded that Ringer's claim was "essentially one requesting the payment of benefits." *Id.* at 620. As the Court explained, a rule "allow-[ing] claimants in Ringer's position to challenge in federal court the Secretary's [general determination] would be inviting them to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.* at 621. In light of the express provisions for judicial review established by the Medicare Act, the Court refused to permit that result. See *id.* at 622 (holding that claimant "must pursue his claim * * * in the manner which Congress has provided").

By contrast, the Court concluded in *McNary* that an immediate action in the district court was a proper forum for resolving certain constitutional claims regarding practices followed by INS in administering claims for relief under IRCA. The Court's opinion discussed *Heckler* at length and distinguished it in two significant ways. First, the Court distinguished plaintiffs' claims in *McNary* from Ringer's claim, characterizing the *McNary* claims as "collateral," in the sense that success in the district court would not "have the effect of establishing their entitlement to [relief]." 111 S. Ct. at 898. Second, the

INS, 375 U.S. 217, 229 (1963). In any event, as discussed below, the *McNary* Court discussed *Heckler* at length, and distinguished it for the reasons explained in the text, but did not suggest that it could be distinguished on the basis of the differing phrases of the Medicare Act and IRCA. See 111 S. Ct. at 897-899.

Court concluded that a contrary holding would "foreclose all forms of meaningful judicial review." *Ibid.*[20] Accordingly, the Court concluded that "[t]he strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of the Reform Act." *Id.* at 899.[21]

Application of those principles to these cases demonstrates the error of the court of appeals' ruling. First, the actions in these cases did seek as a practical matter to establish the class members' entitlement to relief, by resolving in their favor the only substantive issue identified with respect to respondents' circumstances.[22] Indeed, the district court's order in the *CSS* case makes this clear: INS was directed to "rescind * * *

[20] The Court discussed this problem at length, explaining that the administrative record would be inadequate to resolve the plaintiffs' constitutional claims regarding agency practices for processing applications. 111 S. Ct. at 898-899. The Court also supported its decision by analogy to the *Michigan Academy* case, which the Court explained as a case turning on "the concern that absent [district court review] there would be 'no review at all of substantial statutory and constitutional challenges.'" 111 S. Ct. at 899 (quoting *Michigan Academy*, 476 U.S. at 680).

[21] See 111 S. Ct. at 899 (Rehnquist, C.J., dissenting) (explaining that the "Court, with considerable and obvious effort, finds a way to [allow district court review], because to apply the statute as written could bar judicial review of respondents' constitutional claims").

[22] See J.A. 50 (*CSS* order covers "persons prima facie eligible for legalization * * * who departed and reentered the United States without INS authorization * * * following what they assert to have been a brief, casual and innocent absence from the United States"), *id.* at 216 (*LULAC* class includes aliens "who qualified for legalization but who were deemed ineligible for legalization under the original policy").

and readjudicate" class members' applications in accordance with the district court's interpretation of the statute. Pet. App. 24a.[23] To be sure, with respect to the individuals who had not yet filed applications, the court's order did not in fact require INS to grant relief, but simply required it to adjudicate subsequent applications in light of the district court's declaration of the applicable legal principles. But this fact only shows that respondents' claims mirror the claims the Court rejected in *Ringer*. See *Ringer*, 466 U.S. at 620 (explaining that Ringer was seeking "a declaration that the formal ruling * * * [is] invalid and an injunction compelling the Secretary to conclude that [Ringer's interpretation of the statute was correct]"). The Court's comments in that case apply well here: "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to [seek benefits]. * * * [A]ny other construction would allow claimants substantially to undercut Congress' carefully crafted scheme." *Id.* at 621.

Second, the challenges to the regulations in issue here—unlike the claims in *McNary*—are subject to "meaningful judicial review" under the procedures established by IRCA. In both cases respondents' claims amount to nothing more than contentions that

[23] As noted at note 11, *supra*, the government chose not to appeal the portion of the order relating to individuals who filed timely applications. With respect to those individuals, the order as a practical matter is duplicative of relief the individuals could have received in administrative and judicial proceedings based on INS's rescission of the regulation. The redundancy of the district court's order with respect to persons who filed in a timely manner only highlights that court's usurpation of decisional power Congress placed elsewhere.

INS would have applied incorrect standards in determining whether they were entitled to relief under IRCA.[24] Not only are such challenges cognizable under the statute's scheme for review, see, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (court of-appeals decision overturning INS decision denying adjustment of status based on an improper construction of IRCA); *Farrokhi* v. *INS*, 900 F.2d 697, 703-704 (4th Cir. 1990) (considering and rejecting an alien's challenge to INS decision denying adjustment of status), they in fact are among the most common types of challenges to an agency decision denying relief. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 230 (1963) ("Much of the litigation in deportation cases with respect to the setting aside of an administrative determination * * * involves disputed * * * matters of statutory construction."). Because the claim essentially turns on the agency's decision as to how the statute should be applied to a set of fact patterns, the administrative record setting forth the relevant facts of the applicant's situation would provide an adequate basis for judicial review of respondents' claim that INS has misinterpreted the criteria for eligibility. Indeed, by demonstrating the agency's application of its regulation in a specific factual setting, an administrative record in fact would aid judicial review of the claim.

In short, each member of the respondent class readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that would have been brought against them if

[24] See Pet. App. 5a (*CSS* complaint sought "to bar the implementation of th[e challenged] regulation"), *id.* at 8a (*LULAC* complaint "challeng[ed] the validity of the INS's fraudulent reentry regulation").

they had been denied relief.[25] If INS's interpretation of the eligibility requirements were upheld and the aliens were denied adjustment of status, that ruling would have been subject to review in the court of appeals. See 8 U.S.C. 1105a(a) (incorporating by

[25] Respondents argue (Br. in Opp. 17-20) that it is unfair and unduly burdensome to require aliens seeking adjustment of status to await the commencement and conclusion of deportation proceedings against them, and thus that IRCA should not be interpreted to require that result. This argument gains some support from the Court's statement in *McNary* regarding the rigor of the statutory scheme for review:

> [B]ecause there is no provision for direct judicial review of the denial of [relief under IRCA] unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied [relief] can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation[, which] is tantamount to a complete denial of judicial review for most undocumented aliens.

111 S. Ct. at 898. As we pointed out in our reply brief, however (see Reply Br. 5-6), this argument proves too much, for it would establish that all aliens are entitled to district court review. There is nothing unique about the situation of respondents that makes the statutory process any more burdensome for them than for the millions of other aliens for whom Congress designed the process. Accordingly, as the D.C. Circuit explained, this portion of the *McNary* opinion cannot

> be extended to the holding in the case. If it were, even an individual alien could sue in federal district court at any point prior to a deportation order * * *. That would make a hash of the legislative scheme, which envisioned an alien not only coming forward (and losing anonymity) but also becoming the subject of an actual deportation order as prerequisites to judicial review."

See *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742, 752 (D.C. Cir. 1991), petition for cert. pending, No. 91-1924.

reference the procedures for appellate review described in 28 U.S.C. 2342-2350).[26]

It should be clear beyond dispute that Section 1255a(f) would not allow an individual to seek a district court order overturning INS's denial of an application for adjustment.[27] Similarly, it is unreasonable to suggest that a single individual can avoid the preclusive reach of the statute by going directly to the district court without even filing an application. Accordingly, the court of appeals erred in holding that a group of similarly situated individuals can avoid the preclusive reach of the statute by going directly to the district court.[28] That holding affords

[26] It is worth noting that courts have concluded that the exclusivity of the review of deportation available under Section 1105a bars district court review not only of the final deportation order itself, but also of denials of relief that—like adjustment of status—would have the effect of barring deportation. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 220-232 (1963) (discretionary denials of relief in deportation proceedings). Because the relief sought by respondents effectively would bar deportation, this suit would be barred by Section 1105a even in the absence of Section 1255a(f)(1).

[27] Compare *Melendez* v. *Department of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (noting that court of appeals jurisdiction under Section 1105a is exclusive avenue for review of denials of asylum); *Kashani* v. *Nelson*, 793 F.2d 818, 822-828 (7th Cir.) (holding that district courts have no authority to entertain actions challenging denials of asylum), cert. denied, 479 U.S. 1006 (1986). If these cases correctly interpret Section 1105a—which does not contain the express preclusion of alternate forms of review set forth in Section 1255a(f)(1)—as denying claimants a choice of forum in their pursuit of ancillary relief that would bar deportation, it would be all the more odd to conclude that unsatisfied claimants for adjustment of status enjoy such a choice.

[28] To be sure, the *McNary* Court suggested that the statutory reference to a determination respecting " 'an application'

a choice of forum inconsistent with the language and intent of Section 1255a(f). The decision of the court of appeals should be reversed.

II. IRCA PROHIBITS FEDERAL COURTS FROM GRANTING RELIEF TO ALIENS WHO DID NOT FILE TIMELY APPLICATIONS.

The relief sought by respondents was created by IRCA and thus is entirely defined by the terms of Section 201 of IRCA, 8 U.S.C. 1255a. Section 1255a(a) provides that an alien is entitled to adjustment of status "if the alien meets the following requirements." The first of these requirements, set forth in Section 1255a(a)(1), is that the alien "must apply for such adjutment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General." The importance of this requirement is evidenced by the special treatment it receives in Section 1255a(f). That subsection generally establishes pro-

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describes the denial of an individual application." 111 S. Ct. at 896. But this can hardly be read as allowing any challenge to a determination that affects multiple applications. In the first place, each individual can challenge the regulation only to the extent it "respect[s]" his own "application"; he cannot benefit from the regulation's impact on the applications of other aliens. Moreover, as the D.C. Circuit explained, under such a reading

> any class of aliens with similar claims could freely choose between filing declaratory judgment actions in district court and filing individual legalization applications with the INS—or, presumably, both. This reading would transform what the Court agreed were provisions "limit-[ing] review," [*McNary*, 111 S. Ct.] at 898, into provisions bestowing upon aliens a choice of forum.

Ayuda, Inc. v. *Thornburgh*, 948 F.2d 742, 749 n.5 (1991), petition for cert. pending, No. 91-1924.

cedures for administrative and judicial review of 1255a(f)(3) and (4), but, in a subsection headed "No review for late filings," sets out an exception barring review whenever "denial of adjustment of status [is] based on a late filing of an application for such adjustment." It is undisputed that the 12-month period designated by the Attorney General ended on May 4, 1988. See note 1, *supra*. It also is undisputed that the individual members of the respondent classes did not file applications within that period.[29] Accordingly, they are not eligible for relief under IRCA, and Congress has precluded judicial review of any decision denying relief on that basis.[30]

This Court's opinion in *INS* v. *Pangilinan*, 486 U.S. 875 (1988), which reversed a similar action of the Ninth Circuit, demonstrates the error of the Ninth Circuit's decision extending the statutory deadline for applications. In *Pangilinan*, certain citizens of the Philippines claimed eligibility for naturalization under a special statutory program that had expired in 1946. See 486 U.S. at 877-880. The applicants in *Pangilinan* argued that the tardiness of their applications should be excused in order to remedy unlawful actions of the United States government that had prevented them from filing in a timely manner: for a certain period of time the United States

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[29] Although some members of the respondent classes did file timely applications, the government's appeal did not challenge the relief granted those individuals. See note 11, *supra*.

[30] For this reason, it is not at all clear what source of authority would justify a federal court in overturning an INS decision denying relief to respondents based on their failure to file timely applications, even if this Court concluded that the district courts properly required INS to receive and process untimely applications.

had not stationed an officer in the Philippines with authority to receive applications. See *id.* at 879-880. The Ninth Circuit held that the withdrawal of authority to receive applications was unlawful and that naturalization of the applicants would be an appropriate equitable remedy. *Id.* at 882.

This Court reversed. Responding to the notion that the judicially fashioned relief represented an appropriate exercise of the federal courts' equitable powers, this Court explained that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-884. More fundamentally, such a remedy was inappropriate because it violated the strict terms of the statute authorizing naturalization. The Court firmly noted: "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." *Id.* at 883 (brackets by Court; citation omitted).

Respondents argue (Br. in Opp. 22-23) that *Pangilinan* should be limited strictly to cases in which the court's order directly requires naturalization. Such a rule, however, would eviscerate *Pangilinan*, by allowing any court to reach the same substantive result simply by recrafting the terms of its order so that they would not directly require naturalization; the *Pangilinan* court, for example, could have ordered INS to consider the Philippine applications without regard to their lack of timeliness.[31] This case offers a ready example: the district

[31] The suggestion that district courts would recraft their decrees solely to evade the substantive import of this Court's

courts have ordered INS to consider a group of applications identified as having a single disqualifying defect and to excuse that defect. This means, to the extent the applications set forth truthful information, that INS has been ordered to grant these applications, which in turn would entitle the applicants to lawful residency status.[32] There is nothing in this Court's legal analysis that would permit such circumvention of the statutory deadline.[33]

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judgments is not idle. Indeed, as noted at page 9, *supra*, the district court in the *CSS* case did precisely that by entering an alternative injunction—effective if this Court concluded that Section 1255a barred relief to individuals who did not file applications—requiring INS to grant those individuals an apparently permanent right to work and reside in the United States. Because IRCA is the only plausible source of authority to grant such relief, if IRCA bars the district court from requiring INS to grant adjustment of status, it must bar the district court from granting this alternative relief as well.

[32] Nor is it relevant that the relief offered by IRCA is lawful residency, rather than full naturalization. Congress's power to determine which aliens will be permitted lawful residence in this Nation is just as plenary as its power to determine who will be permitted to become a citizen. Moreover, a grant of temporary resident status is the first step in a statutory process designed to lead to citizenship. Under 8 U.S.C. 1255a (b) (1), aliens attaining lawful temporary resident status can become lawful permanent residents after a one-year waiting period. Lawful permanent residents in turn become eligible for citizenship after a five-year waiting period. See 8 U.S.C. 1427(a).

[33] The Ninth Circuit suggested that this Court's decision in *McNary* supported the relief issued here, noting that the *McNary* Court stated that its ruling would allow aliens "to have their case files reopened and their applications reconsidered." Pet. App. 17a (quoting *McNary*, 111 S. Ct. at 898). The critical difference, of course, is that the order affirmed by

Respondents also argue (Br. in Opp. 23-26) that the court of appeals' decision is nothing more than a commonplace application of the doctrine of equitable tolling discussed in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). Several significant problems beplague this argument. First, and most importantly, the argument assumes that the timeliness requirement is a statute of limitations. That is not correct. As the structure of the statute makes clear, the timeliness requirement is one of the four substantive requirements for relief, set forth in the four paragraphs of Section 1255a(a). Because Congress intended to create a program of limited duration, it provided that the class of eligible aliens would include only aliens who sought relief within the designated twelve-month period. The court of appeals erred in assuming the power to ignore this requirement.[34]

For several reasons, respondents err in relying (Br. in Opp. 25-26) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986). As the Court noted, the statute at

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this Court in *McNary* commanded INS to reconsider under proper procedures applications that had been filed in a timely manner. The Ninth Circuit's opinion orders INS to consider untimely applications in defiance of the express, statutory requirements for granting an application.

[34] See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981) (summarily reversing a court of appeals decision waiving an application requirement in response to allegations that the claimant failed to file based on the agency's advice that the claimant was ineligible for relief; explaining that "[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

issue in *City of New York* expressly authorized tolling of the filing requirement by the Secretary. See 476 U.S. at 480. Because IRCA contains both a clear statutory requirement that an application be filed by a date certain and an express preclusion of judicial or administrative review of denials based on a failure to file in time, *City of New York* does not justify the relief affirmed by the court of appeals. Moreover, as the Court subsequently has noted, *City of New York* turned on the fact that the challenged policy was "a secret, internal policy," rather than a published regulation, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). Because the respondent classes by definition include only people who knew about the policy,[35] *City of New York* is inapplicable.

In any event, the facts of this case are not adequate to support equitable tolling. As the Court explained in *Irwin*, equitable tolling typically is available when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 111 S. Ct. at 458. Respondents plainly did not "actively pursu[e] their remedies"; if they had filed timely applications, the matter would not have reached this Court. Nor is it fair to say that government misconduct somehow tricked them into not filing. The sole government conduct at issue is the government's promulgation of

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[35] See Pet. App. 25a (*CSS* court granted extension only to individuals who "knew of [the challenged] regulation"); J.A. 216 (*LULAC* court granted extension only to individuals who did not apply "relying upon information that they were ineligible").

its understanding of the statutory requirements, which differed from respondents' understanding.[36] The government in no way misrepresented the date of the deadline or the requirements for filing. Rather, it simply advised respondents that it believed they would not be entitled to relief even if they did file. See Pet. App. 54a (*LULAC* district court's statement that respondents have failed "to demonstrate affirmative misconduct by the INS"). The clear inadequacy of this as a basis for equitable tolling is evident from the consequences of respondents' argument: if a party's expression of its belief that it would prevail in litigation were sufficient to toll a statute of limitations, there would never be a bar of limitations in any case in which the defendant disclaimed liability. Accordingly, there is no basis for application of the doctrine of equitable tolling in this context.

We wish to emphasize that nothing in our position deprives the federal courts of the power and authority to provide effective remedies for violations of federal law. The only conduct at issue is INS's allegedly improper construction of the statute. If the individual members of respondent classes had made themselves eligible for relief by filing an application within the time period established by Congress, the courts of appeals, and this Court, if necessary, would

[36] As this Court has recognized, incorrect statements of the law by government agencies do not justify courts in excusing applicants for public benefits from complying with the law. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981); see also *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 63 (1984) (describing "the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law").

have been fully capable of ensuring that each application was evaluated in a manner consistent with the standards established by Congress. It may have been more convenient and less expensive for respondents to refrain from filing applications and proceed directly to the district court, but the inability of that court to provide a remedy does not suggest an undue limitation on the equitable powers of the federal courts; it is the necessary result of respondents' unwillingness to avail themselves of the limited opportunity for relief offered by the Nation's elected representatives.

The fundamental problem with the holding of the court of appeals is its view that the need to further its views regarding the general congressional policy behind IRCA justified it in ordering INS to ignore other provisions of the statute. Such a holding necessarily ignores the policies set forth in the provisions of the statute that limit the relief offered by Congress. As this Court explained when it rejected an earlier order by the court of appeals extending a statutory deadline in the immigration context: "Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress." *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). This Court should reverse the decision of the court of appeals ordering petitioners to act in contravention of the congressionally mandated policy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED BY PUB. L. 99-603, THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, AND PUB. L. 100-204, SECTION 902

Sec.

245a.1 Definitions.

245a.2 Application for temporary residence.

245a.3 Application for adjustment from temporary to permanent resident status.

245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

AUTHORITY: Pub. L. 99-603, 100 Stat. 3359, 8 U.S.C. 1101, 1103, 1255a, 1255a note; Pub. L. 100-204, 101 Stat. 1331; Pub. L. 100-649.

SOURCE: 52 FR 16208, May 1, 1987, unless otherwise noted

§ 215a.1 **Definitions.**

As used in this chapter:

(a) *Act* means the Immigration and Nationality Act, as amended by The Immigration Reform and Control Act of 1986.

(b) *Service* means the Immigration and Naturalization Service (INS).

(c)(1) *Resided continuously* as used in section 245A(a)(2) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

An alien who after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States, pursuant to the stateside criteria program, shall be regarded as having been granted advance parole by the Service.

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application.

(2) *Continuous residence*, as used in section 245A(b)(1)(B) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of applying for adjustment from temporary residence to permanent resident status: No single absence from the United States has exceeded thirty (30) days, and the aggregate of all absences has not exceeded ninety (90) days between the date of granting of lawful temporary resident status and of applying for permanent resident status, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period(s) allowed.

(d) In the term *alien's unlawful status was known to the government*, the term *government* means the Immigration and Naturalization Service. An alien's unlawful status was *known to the government* only if:

(1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of *information constituting a violation of the alien's nonimmigrant status*, the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or

(2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was

subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Departure Records granting a period of time in which to depart the United States without imposition of proceedings; Forms I-210, Voluntary Departure Notice letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from Service records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of Deportable Alien;

Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Forms I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceedings, or any other Service record reflecting that the alien's nonimmigrant status was considered by the Service to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted; or

(3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the Service a report that clearly indicated

the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the Service the aforementioned report and that the school no longer has available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

(e) The term *to make a determination* as used in § 245a.2(t)(3) of this part means obtaining and reviewing all information required to adjudicate an application for the benefit sought and making a decision thereon. If fraud, willful misrepresentation or concealment of a material fact, knowingly providing a false writing or document, knowingly making a false statement or representation, or any other activity prohibited by section 245A(c)(6) of the Act is established during the process of making the determination on the application, the Service shall refer to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(f) The term *continuous physical presence* as used in section 245A(a)(3)(A) of the Act means actual continuous presence in the United States since November 6, 1986 until filing of any application for adjustment of status. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to May 1, 1987, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.

(g) *Brief, casual, and innocent* means a departure authorized by the Service (advance parole) subse-

quent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(h) The term *brief and casual absences* as used in section 245a(b)(3)(A) of the Act permits temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must comply with § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

(i) *Public cash assistance* means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain type of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

(j) *Legalization Office* means local offices of the Immigration and Naturalization Service which accept and process applications for Legalization or Special Agricultural Worker status, under the authority of the INS district directors in whose districts such offices are located.

(k) *Regional Processing Facility* means Service offices established in each of the four Service regions to adjudicate, under the authority of the INS Directors of the Regional Processing Facilities, applications for adjustment of status under section 210, 245A(a) or 245A(b)(1) of the Act.

(l) *Designated entity* means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for Legalization status.

(m) The term *family unity* as used in section 245(d)(2)(B)(i) of the Act means maintaining the family group without deviation or change. The family group shall include the spouse, unmarried minor children under 18 years of age who are not members of some other household, and parents who reside regularly in the household of the family group.

(n) The term *prima facie* as used in section 245(e)(1) and (2) of the Act means eligibility is established if the applicant presents a completed I-687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part.

(o) *Misdemeanor* means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 CFR 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

(p) *Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception, for purposes of 8 CFR part 245a, the crime shall be treated as a misdemeanor.

(q) *Subject of an Order to Show Cause* means actual service of the Order to Show cause upon the alien through the mail or by personal service.

(r) *A qualified designated entity in good-standing with the Service* means those designated entities whose cooperative agreements were not suspended or terminated by the Service or those whose agreements were not allowed to lapse by the Service prior to January 30, 1989 (the expiration date of the INS cooperative agreements for all designated entities), or those whose agreements were not terminated for cause by the Service subsequent to January 30, 1989.

Subsequent to January 30, 1989, and throughout the period ending on November 6, 1990, a QDE in good-standing may: (1) Serve as an authorized course provided under § 245a.3(b)(5)(i)(C) of this chapter; (2) Administer the IRCA Test for Permanent Residency (proficiency test), provided an agreement has been entered into with and authorization has been given by INS under § 245a.1(s)(5) of this chapter; and, (3) Certify as true and compiete copies of original documents submitted in support of Form I-698 in the format prescribed in § 245a.3(d)(2) of this chapter.

(s) *Satisfactorily pursuing*, as used in section 245A(b)(1)(D)(i)(II) of the Act, means:

(1) An applicant for permanent resident status has attended a recognized program for at least 40 hours of a minimum 60-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English/citizenship course prescribed by the recognized program in which he or she is enrolled (as long as enrollment occurred on or after May 1, 1987, course stndards include attainment of particular functional

skills related to communicative ability, subject matter knowledge, and English language competency, and attainment of these skills is measured either by successful completion of learning objectives appropriate to the applicant's ability level, or attainment of a determined score on a test or tests, or both of these); or

(2) An applicant presents a high school diploma or general educational development diploma (GED) from a school in the United States. A GED gained in a language other than English is acceptable only if a GED English proficiency test has been passed. (The curriculum for both the high school diploma and the GED must have included at least 40 hours of instruction in English and U.S. history and government); or

(3) An applicant has attended for a period of one academic year (or the equivalent thereof according to the standards of the learning institution), a state recognized, accredited learning institution in the United States and that institution certifies such attendance (as long as the curriculum included at least 40 hours of instruction in English and U.S. history and government); or

(4) An applicant has attended courses conducted by employers, social, community, or private groups certified (retroactively, if necessary, as long as enrollment occurred on or after May 1, 1987, and the curriculum included at least 40 hours of instruction in English and U.S. history and government) by the district director or the Director of the Outreach Program under § 245a.3(b)(5)(i)(D) of this chapter; or

(5) An applicant attests to having completed at least 40 hours of individual study in English and U.S. history and government and passes the proficiency

test for legalization, called the IRCA Test for Permanent Residency, indicating that the applicant is able to read and understand minimal functional English within the context of the history and government of the United States. Such test may be given by INS, as well as, State Departments of Education (SDEs) (and their accredited educational agencies) and Qualified Designated Entities in good-standing (QDEs) upon agreement with and authorization by INS. Those SDEs and QDEs wishing to participate in this effort should write to the Director of the INS Outreach Program at 425 "I" Street, NW., Washington, DC 20536, for further information.

(t) Minimal understanding of ordinary English as used in section 245A(b)(1)(D)(i) of the Act means an applicant can satisfy basic survival needs and routine social demands. The person can handle jobs that involve following simple oral and very basic written communication.

(u) *Curriculum* means a defined course for an instructional program. Minimally, the curriculum prescribes what is to be taught, how the course is to be taught, with what materials, and when and where. The curriculum must:

(1) Teach words and phrases in ordinary, everyday usage;

(2) Include the content of the Federal Citizenship Text series as the basis for curriculum development (other texts with similar content may be used in addition to, but not in lieu of, the Federal Citizenship Text series);

(3) Be designed to provide at least 60 hours of instruction per class level;

(4) Be relevant and educationally appropriate for the program focus and the intended audience; and

(5) Be available for examination and review by INS as requested.

(v) The term *developmentally disabled* means the same as the term *developmental disability* defined in section 102(5) of the Developmental Disabilities Assistance and Bill of Rights Act of 1987, Pub. L. 100-146. As a convenience to the public, that definition is printed here in its entirety:

> The term *developmental disability* means a severe, chronic disability of a person which;
>
> (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (2) Is manifested before the person attains age twenty-two;
>
> (3) Is likely to continue indefinitely;
>
> (4) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
>
> (5) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

[52 FR 16208, May 1, 1987, as amended at 52 FR 43845, Nov. 17, 1987; 53 FR 9863, Mar. 28, 1988; 53 FR 23382, June 22, 1988; 53 FR 43992, Oct. 31, 1988; 54 FR 29448, July 12, 1989; 56 FR 31061, July 9, 1991]

§ 245a.2 **Application for temporary residence.**

(a) *Application period for temporary residence.* (1) An alien who has resided unlawfully in the United States since January 1, 1982, who believes that he or she meets the eligibility requirements of section 245A of the Act must make application within the twelve month period beginning on May 5, 1987 and ending on May 4, 1988, except as provided in the following paragraphs.

(2) (i) [Reserved]

(ii) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on May 5, 1987 and ending on April 4, 1988 must file an application for adjustment of status to that of a temporary resident prior to the thirty-first day after the issuance of the Order to Show Cause.

(iii) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on April 5, 1988 and ending on May 4, 1988 must file an application for adjustment of status to that of a temporary resident not later than May 4, 1988.

(iv) An alien, described in paragraphs (a)(2)(i) through (iii) of this section, who fails to file an application for adjustment of status to that of a temporary resident under section 245A(a) of the Act during the respective time period(s), will be statutorily ineligible for such adjustment of status.

(b) *Eligibility.* The following categories of aliens, who are otherwise eligible to, apply for legalization, may file for adjustment to temporary resident status:

(1) An alien (other than an alien who entered as a nonimmigrant) who establishes that he or she entered the United States prior to January 1, 1982, and

who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(2) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose period of authorized admission expired through the passage of time prior to January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(3) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(4) An alien described in paragraphs (b)(1) through (3) of this section who was at any time a nonimmigrant exchange visitor (as defined in section 101(a)(15)(J) of the Act), must establish that he or she was not subject to the two-year foreign residence requirements of section 212(e) or has fulfilled that requirement or has received a waiver of such requirements and has resided continuously in the United States in unlawful status since January 1, 1982.

(5) An alien who establishes that he or she was granted voluntary departure, voluntary return, extended voluntary departure or placed in deferred action category by the Service prior to January 1, 1982 and who has thereafter resided continuously in such

status in the United States and who has been physically present in the United States from November 6, 1986 until the date of filing the application.

(6) An alien who establishes that he or she was paroled into the United States prior to January 1, 1982, and whose parole status terminated prior to January 1, 1982, and who has thereafter resided continuously in such status in the United States, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(7) An alien who establishes that he or she is a Cuban or Haitian Entrant who was physically present in the United States prior to January 1, 1982, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from November 6, 1986, until the date of filing the application, without regard to whether such alien has applied for adjustment of status pursuant to section 202 of the Act.

(8) An alien's eligibility under the categories described in section 245(a)(2)(b)(1) through (7) and (9) through (15) shall not be affected by entries to the United States subsequent to January 1, 1982 that were **not** documented on Service Form I-94, Arrival-Departure Record.

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being decumented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable

charge 212(a)(19) as an alien who entered the United States by fraud.

(11) A nonimmigrant who entered the United States for duration of status ("D/S") is one of the following classes, A, A-1, A-2, G, G-1, G-2, G-3 or G-4, whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 1, 1982, and who has thereafter continued to reside in the United States in an unlawful status. An alien who was a dependent family member and who may be otherwise eligible for legalization may be considered a member of this class of eligible aliens if the dependent family member was also in A and G status when the principal A or G alien's status terminated or ceased to be recognized by the Department of State.

(12) A nonimmigrant who entered the United States for duration of status ("D/S") in one of the following classes, F, F-1, F-2, who completed a full course of study, including practical training and whose time period if any to depart the United States after completion of study expired prior to January 1, 1982 and who has remained in the United States in an unlawful status since that time. A dependent F-2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I-94, Arrival-Departure Record that extended beyond January 1, 1982 is considered eligible if the principal F-1 lien is found eligible.

(13) An alien who establishes that he or she is a member of the class in the Silva-Levi lawsuit (No. 76-C-4268 (N.D. Ill. March 22, 1977)); that is, an alien from an independent country of the Western Hemisphere who was present in the United States

prior to March 11, 1977, and was known by the Immigration and Naturalization Service (INS) to have a priority date for the issuance of an immigrant visa between July 1, 1968 and December 31, 1976, inclusive, and who was clearly eligible for an immigrant visa.

(14) An alien who filed an asylum application prior to January 1, 1982 and whose application was subsequently denied or whose application has not yet been decided is considered an alien in an unlawful status known to the government.

(15) An alien, otherwise eligible who departed the United States and was paroled into the United States on or before May 1, 1987 in order to return to an unrelinquished unlawful residence.

(c) *Ineligible aliens.* (1) An alien who has been convicted of a felony, or three or more misdemeanors.

(2) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group or political opinion.

(3) An alien excludable under the provisions of section 212(a) of the Act whose grounds of excludability may not be waived, pursuant to section 245A(d)(2)(B)(ii) of this Act.

(4) An alien who at any time was a nonimmigrant exchange visitor who is subject to the two-year foreign residence requirement unless the requirement has been satisfied or waived pursuant to the provisions of section 212(e) of the Act who has resided continuously in the United States in an unlawful status since January 1, 1982.

(5) [Reserved]

(6) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act dur-

ing the period beginning on May 5, 1987 and ending on April 4, 1988 who does not file an application for adjustment of status to that of temporary resident under section 245(A)(a) of the Act prior to the thirty-first day after issuance of the order.

(7) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on April 5, 1988 and ending on May 4, 1988 who does not file an application for adjustment of status to that of a temporary resident under section 245A(a) of the Act prior to May 5, 1988.

(8) An alien who was paroled into the United States prior to January 1, 1982 and whose parole status terminated or expired subsequent to January 1, 1982, except an alien who was granted advance parole.

(d) *Documentation.* Evidence to support an alien's eligibility for the legalization program shall include documents establishing proof of identity, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD-258), and a completed medical report of examination (Form I-693). All documentation submitted will be subject to Service vertification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for these three categories are discussed below.

(1) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference:

(i) Passport;

(ii) Birth certificate;

(iii) Any national identity document from the alien's country of origin bearing photo and fingerprint (e.g., a "cedula" or "cartilla");

(iv) Driver's license or similar document issued by a state if it contains a photo;

(v) Baptismal Record/Marriage Certificate; or

(vi) Affidavits.

(2) *Assumed names*—(i) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (d)(1) of this section. The assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirements of this paragraph documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(ii) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint or detailed physical description. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to affiant under the assumed name in question will carry greater weight.

(3) *Proof of residence.* Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(i) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(A) Alien's address at the time of employment;

(B) Exact period of employment;

(C) Periods of layoff;

(D) Duties with the company;

(E) Whether or not the information was taken from official company records; and

(F) Where records are located and whether the Service may have access to the records.

If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of (3)(i)(E) and (3)(i)(F) of this paragraph. This affidavit form-letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

(ii) Utility bills (gas, electric, phone, etc.), receipts, or letters from companies showing the dates during which the applicant received service are acceptable documentation.

(iii) School records (letters, report cards, etc.) from the schools that the applicant or their children have attended in the United States must show name of school and periods of school attendance.

(iv) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(v) Attestations by churches, unions, or other organizations to the applicant's residence by letter which:

(A) Identifies applicant by name;

(B) Is signed by an official (whose title is shown);

(C) Shows inclusive dates of membership;

(D) States the address where applicant resided during membership period;

(E) Includes the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(F) Establishes how the author knows the applicant; and

(G) Establishes the origin of the information being attested to.

(vi) Additional documents to support the applicant's claim may include:

(A) Money order receipts for money sent in or out of the country;

(B) Passport entries;

(C) Birth certificates of children born in the United States;

(D) Bank books with dated transactions;

(E) Letters or correspondence between applicant and another person or organization;

(F) Social Security card;

(G) Selective Service card;

(H) Automobile license receipts, title, vehicle registration, etc.;

(I) Deeds, mortgages, contracts to which applicant has been a party;

(J) Tax receipts;

(K) Insurance policies, receipts, or letters; and

(L) Any other relevant document.

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(i) Evidence of a history of employment (i.e., employment letter, W-2 Forms, income tax returns, etc.);

(ii) Evidence that he she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(iii) Form I-134, Affidavit of Support, completed by a spouse in behalf of the applicant and or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

(5) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245a of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification as set forth in paragraph (d) of this section.

(6) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

(e) *Filing of application.* (1) The application must be filed on Form I-687 at an office of a designated entity or at a Service Legalization Office within the jurisdiction of the District wherein the applicant resides. If the application is filed with a designated entity, the alien must have consented to having the

designated entity forward the application to the legalization office. In the case of applications filed at a legalization office, the district director may, at his or her discretion:

(i) Require the applicant to file the application in person; or

(ii) Require the applicant to file the application by mail; or

(iii) Permit the filing of applications either by mail or in person.

The applicant must appear for a personal interview at the legalization office as scheduled. If the applicant is 14 years of age or older, the application must be accompanied by a completed Form FD-258 (Applicant Card).

(2) At the time of the interview, wherever possible, original documents must be submitted except the following: Official government records; employment or employment-related records maintained by employers, unions, or collective bargaining organizations; medical records; school records maintained by a school or school board; or other records maintained by a party other than the applicant. Copies of records maintained by parties other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. If at the time of the interview the return of original documents is desired by the applicant, they must be accompanied by notarized copies or copies certified true and correct by a qualified designated entity or by the alien's representative in the format prescribed in § 204.2(j)(1) or (2) of this chapter. At the discretion of the district director, original documents, even if accom-

panied by certified copies, may be temporarily retained for forensic examination by the Document Analysis Unit at the Regional Processing Facility having jurisdiction over the legalization office to which the documents were submitted.

(3) A separate application (I-687) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check, or certified bank check, made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(f) *Filing date of application.* The date the alien submits a completed application to a Service Legalization Office or designated entity shall be considered the filing date of the application, provided that in the case of an application filed at a designated entity the alien has consented to having the designated entity forward the application to the Service Legalization Office having jurisdiction over the location of the alien's residence. The designated entites are required to forward completed applications to the appropriate Service Legalization Office within sixty days of receipt.

(g) *Selective Service registration.* At the time of filing an application under this section, male applicants over the age of 17 and under the age of 26 are required to be registered under the Military Selective Service Act. An applicant shall present evidence that he has previously registered under that Act in the form of a letter of acknowledgement from the Selective Service System, or such alien shall present a completed and signed Form SSS-1 at the time of

filing Form I-687 with the Immigration and Naturalization Service or a designated entity. Form SSS-1 will be forwarded to the Selective Service System by the Service.

(h) *Continuous residence.* (1) For the purpose of this Act, an applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining a residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

(2) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

(i) *Medical examination.* An applicant under this part shall be required to submit to an examination by a designated civil surgeon at no expense to the government. The designated civil surgeon shall report on the findings of the mental and physical condition of the applicant and the determination of the alien's immunization status. Results of the medical examination must be presented to the Service at the time

of interview and shall be incorporated into the record. Any applicant certified under paragraphs (1), (2), (3), (4), or (5) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

(j) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service Legalization Office and must be fingerprinted for the purpose of issuance of Forms I-688 and I-688A. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant.

(k) *Applicability of exclusion grounds*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for temporary resident status: (14) Workers entering without Labor Certification; (20) immigrants not in possession of a valid entry document; (21) visas issued without compliance with section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of exclusion.* Except as provided in paragraph (k)(3) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly

with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (k)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(iii) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(iv) Paragraph (33) (participated in Nazi persecution).

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

(5) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and or has not had a criminal record are subject to a verification of facts by the Service. The applicant

must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

(l) *Continuous physical presence since November 6, 1986.* (1) An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since November 6, 1986. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to May 1, 1987, and meet the continuous residence requirements and are otherwise eligible for legalization.

(2) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(m) *Departure.* (1) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service Legalization Office and the date status as a temporary resident is granted, the alien applicant can only be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in § 212.5(e) of this chapter.

(2) An alien whose application for temporary resident status has been approved may be admitted to the United States upon return as a returning temporary resident provided he or she:

(i) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(ii) Has not been absent from the United States more than thirty (30) days on the date application for admission is made;

(iii) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(iv) Presents Form I-688;

(v) Presents himself or herself for inspection; and

(vi) Is otherwise admissible.

(3) The periods of time in paragraph (m)(2)(ii) and (m)(2)(iii) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief temporary trip abroad due to emergent or extenuating circumstances beyond the alien's control.

(n)(1) *Employment and travel authorization; general.* Authorization for employment and travel abroad for temporary resident status applicants under section 245A(a) of the Act may only be granted by a Service Legalization Office. INS district directors will determine the Service location for the completion of processing of travel documentation. In the case of an application which has been filed with a designated entity, employment authorization may only be granted by the Service after the application has been properly received at the Service Legalization Office.

(2) *Employment and travel authorization prior to the granting of temporary resident status.* (i) Permission to travel abroad and accept employment may be granted to the applicant after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status. Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in § 212.5(e) of this chapter after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status.

(ii) If an appointment cannot be scheduled within thirty (30) days, authorization to accept employment will be given, valid to the scheduled appointment date. The appointment letter will be endorsed with the temporary employment authorization. Form I-688A, Employment Authorization, will be given to the applicant after an interview has been completed by an immigration officer unless a formal denial is issued by a Service Legalization Office. This temporary employment authorization will be restricted to six months duration, pending final determination on the application for temporary resident status.

(3) *Employment and travel authorization upon grant of temporary resident status.* Upon grant of an application for adjustment to temporary resident status by a Regional Processing Facility, the processing facility will forward a notice of approval to the alien at his or her last known address and to his or her designated entity or representative. The alien will be required to return to the Service Legalization Office where the application was initially received, surrender the I-688A previously issued, and will be

issued Form I-688, Temporary Resident Card, authorizing employment and travel abroad.

(4) *Revocation of employment authorization upon denial of temporary resident status.* Upon denial of an application for adjustment to temporary resident status the alien will be notified that if a timely appeal is not submitted, employment authorization shall be automatically revoked on the final day of the appeal period.

(o) *Decision.* The applicant shall be notified in writing of the decision, and, if the application is denied, of the reason therefor. An appeal from an adverse decision under this part may be taken by the applicant on Form I-694.

(p) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal with the required fee shall be filed with the Regional Processing Facility within thirty (30) days after service of the notice of denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the thirty (30) day period has tolled will not be accepted. The thirty (30) day period includes any time required for service or receipt by mail.

(q) *Motions.* The Regional Processing Facility director may *sua sponte* reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision that will grant the benefit which has been requested. The director's new decision must be served on the appealing party within 45 days of receipt of any briefs and/or new evidence, or upon expiration

of the time allowed for the submission of any briefs. Motions to reopen a proceeding or reconsider a decision shall not be considered under this part.

(r) *Certifications.* The Regional Processing Facility director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The party affected shall be given notice of such certification and of the right to submit a brief within thirty (30) days from service of the notice.

(s) *Date of adjustment to temporary residence.* The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at Service Legalization Office.

(t) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Justice Department or bureau of agency thereof, will be permitted to examine individual applications, except employees of designated entities where applications are filed with the same designated entity. For purposes of this part, any individual employed under contract by the Service to work in connection with the legalization program shall be considered an "employee of the Justice Department or bureau or agency thereof."

(2) Files and records prepared by designated entities under this section are confidential. The Attorney General and the Service shall not have access to these files and records without the consent of the alien.

(3) No information furnished pursuant to an application for legalization under this section shall be used for any purpose except: (i) To make a deter-

mination on the application; or, (ii) for the enforcement of the provisions encompassed in section 245A (c) (6) of the Act, except as provided in paragraph (t) (4) of this section.

(4) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A (c) (6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(5) Information obtained in a granted legalization application and contained in the applicant's file is subject to subsequent review in reference to future benefits applied for (including petitions for naturalization and permanent resident status for relatives).

(u) *Termination of temporary resident staus* [*sic*] —(1) *Termination of temporary resident status; General.* The status of an alien lawfully admitted for temporary residence under section 245A (a) (1) of the Act may be terminated at any time in accordance with section 245A (b) (2) of the Act. It is not necessary that a final order of deportation be entered in order to terminate temporary resident status. The temporary resident status may be terminated upon the occurence of any of the following:

(i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;

(ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2 (k) (2).

(iii) The alien is convicted of any felony, or three or more misdemeanors;

(iv) The alien fails to file for adjustment of status from temporary resident to permanent resident on Form I-698 within forty-three (43) months of the date he/she was granted status as a temporary resident under § 245a.1 of this part.

(2) *Procedure.* Termination of an alien's status under paragraph (u) (1) of this section will be made only on notice to the alien sent by certified mail directed to his or her last known address, and to his or her representative. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within thirty (30) days after the service of the Notice of Intent to Terminate. If the alien's status is terminated, the director of the regional processing facility shall notify the alien of the decision and the reasons for the termination, and further notify the alien that any Service Form I-94, Arrival-Departure Record or other official Service document issued to the alien authorizing employment and/or travel abroad, or any Form I-688, Temporary Resident Card previously issued to the alien will be declared void by the director of the regional processing facility within thirty (30) days if no appeal of the termination decision is filed within that period. The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal with the required fee shall be filed with the regional processing facility within thirty (30) days after the service of the notice of termination. If no appeal is filed within

that period, the I-94, I-688 or other official Service document shall be deemed void, and must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(3) *Termination not construed as rescission under section 246.* For the purposes of this part the phrase *termination of status* of an alien granted lawful temporary residence under section 245A(a) of the Act shall not be construed to necessitate a rescission of status as described in section 246 of the Act, and the proceedings required by the regulations issued thereunder shall not apply.

(4) *Return to unlawful status after termination.* Termination of the status of any alien previously adjusted to lawful temporary residence under section 245A(a) of the Act shall act to return such alien to the unlawful status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under section 236 or 242 of the Act, as appropriate.

(v) *Ineligibility for immigration benefits.* An alien whose status is adjusted to that of a lawful temporary resident under section 245A of the Act is not entitled to submit a petition pursuant to section 203(a)(2) or to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence.

(w) *Declaration of Intending Citizen.* An alien who has been granted the status of temporary resident under section 245A(a)(1) of this Act may assert a claim of discrimination on the basis of citizenship status under section 274B of the Act only if he or she has previously filed Form I-772 (Declaration of Intending Citizen) after being granted such status. The Declaration of Intending Citizen is not required as a

basis for filing a petition for naturalization; nor shall it be regarded as a right to United States citizenship; nor shall it be regarded as evidence of a person's status as a resident.

[52 FR 16208, May 1, 1987, as amended at 52 FR 43845, 43846, Nov. 17, 1987; 53 FR 23382, June 22, 1988; 54 FR 29449, July 12, 1989; 56 FR 31061, July 9, 1991]

§ 245a.3 Application for adjustment from temporary to permanent resident status.

(a) *Application period for permanent residence.* (1) An alien may submit an application for lawful permanent residence status, with fee, immediately subsequent to the granting of lawful temporary resident status. Any application received prior to the alien's becoming eligible for adjustment to permanent resident status will be administratively processed and held by the INS, but will not be considered filed until the beginning of the nineteenth month after the date the alien was granted temporary resident status as defined in § 245a.2(s) of this chapter.

(2) No application shall be denied for failure to timely apply before the end of 43 months from the date of actual approval of the temporary resident application.

(3) The Service Center Director shall sua sponte reopen and reconsider without fee any application which was previously denied for late filing. No additional fee will be required for those applications which are filed during the twelve month extension period but prior to July 9, 1991.

(b) *Eligibility.* Any alien who has been lawfully admitted for temporary resident status under section

245A(a) of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien:

(1) Applies for such adjustment anytime subsequent to the granting of temporary resident status but on or before the end of 43 months from the date of actual approval of the temporary resident application. The alien need not be physically present in the United States at the time of application; however, the alien must establish continuous residence in the United States in accordance with the provisions of paragraph (b)(2) of this section and must be physically present in the United States at the time of interview and or processing for permanent resident status (ADIT processing);

(2) Establishes continuous residence in the United States since the date the alien was granted such temporary residence status. An alien shall be regarded as having resided continuously in the United States for the purpose of this part if, at the time of applying for adjustment from temporary to permanent resident status, or as of the date of eligibility for permanent residence, which ever is later, no single absence from the United States has exceeded thirty (30) days, and the aggregate of all absences has not exceeded ninety (90) days between the date of approval of the temporary resident application, Form I-687 (not the "roll-back" date) and the date the alien applied or became eligible for permanent resident status, whichever is later, unless the alien can establish that due to emergent reasons or circumstances beyond his or her control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than

30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent residence, shall break the continuity of such residence, unless the temporary resident can establish to the satisfaction of the district director or the Director of the Regional Processing Facility that he or she did not, in fact, abandon his or her residence in the United States during such period;

(3) Is admissible to the United States as an immigrant, except as otherwise provided in paragraph (g) of this section; and has not been convicted of any felony, or three or more misdemeanors; and

(4)(i)(A) Can demonstrate that the alien meets the requirements of section 312 of the Immigration and Nationality Act, as amended (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

(B) Is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

(ii) The requirements of paragraph (b)(4)(i) of this section must be met by each applicant. However, these requirements shall be waived without formal application for persons who, as of the date of application or the date of eligibility for permanent residence under this part, whichever date is later, are:

(A) Under 16 years of age; or

(B) 65 years of age or older; or

(C) Over 50 years of age who have resided in the United States for at least 20 years and submit evidence establishing the 20-year qualification require-

ment. Such evidence must be submitted pursuant to the requirements contained in Section 245a.2(d)(8) of this chapter; or

(D) Developmentally disabled as defined at § 245a.1 (v) of this chapter. Such persons must submit medical evidence concerning their developmental disability; or

(E) Physically unable to comply. The physical disability must be of a nature which renders the applicant unable to acquire the four language skills of speaking, understanding, reading, and writing English in accordance with the criteria and precedence established in OI 312.1(a)(2)(iii) (Interpretations). Such persons must submit medical evidence concerning their physical disability.

(iii)(A) Literacy and basic citizenship skills may be demonstrated for purposes of complying with paragraph (b)(4)(i)(A) of this section by:

(*1*) Speaking and understanding English during the course of the interview for permanent resident status. An applicant's ability to read and write English shall be tested by excerpts from one or more parts of the Federal Textbooks on Citizenship at the elementary literacy level. The test of an applicant's knowledge and understanding of the history and form of government of the United States shall be given in the English language. The scope of the testing shall be limited to subject matter covered in the revised (1987) Federal Textbooks on Citizenship or other approved training material. The test questions shall be selected from a list of 100 standardized questions developed by the Service. In choosing the subject matter and in phrasing questions, due consideration shall be given to the extent of the applicant's education, background, age, length of residence in the

United States, opportunities available and efforts made to acquire the requisite knowledge, and any other elements or factors relevant to an appraisal of the adequacy of his or her knowledge and understanding; or

(*2*) By passing a standardized section 312 test (effective retroactively as of November 7, 1988) such test being given in the English language by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS). The scope of the test is based on the 1987 edition of the Federal Textbooks on Citizenship series written at the elementary literacy level. An applicant may evidence passing of the standardized section 312 test by submitting the approved testing organization's standard notice of passing test results at the time of filing Form I-698, subsequent to filing the application but prior to the interview, or at the time of the interview. The test results may be independently verified by INS, if necessary.

(B) An applicant who fails to pass the English literacy and/or the U.S. history and government tests at the time of the interview, shall be afforded a second opportunity after six (6) months (or earlier, at the request of the applicant) to pass the tests, submit evidence of passing an INS approved section 312 standardized examination or submit evidence of fulfillment of any one of the "satisfactory pursuing" alternatives listed at § 245a.1(s) of this chapter. The second interview shall be conducted prior to the denial of the application for permanent residence and may be based solely on the failure to pass the basic citizenship skills requirements. An applicant whose period of eligibility expires prior to the end of the

six-month re-test period, shall still be accorded the entire six months within which to be re-tested.

(iv) To satisfy the English language and basic citizenship skills requirements under the "satisfactorily pursuing" standard as defined at § 245a.1(s) of this chapter the applicant must submit evidence of such satisfactory pursuit in the form of a "Certificate of Satisfactory Pursuit" (Form I-699) issued by the designated school or program official attesting to the applicant's satisfactory pursuit of the course of study as defined at § 245a.1(s)(1) and (4) of this chapter; or a high school diploma or general educational development diploma (GED) under § 245a.1(s)(2) of this chapter; or certification on letterhead stationery from a state recognized, accredited learning institution under § 245a.1(s)(3) of this chapter; or evidence of having passed the IRCA Test for Permanent Residency under § 245a.1(s)(5) of this chapter. Such applicants shall not then be required to demonstrate that they meet the requirements of § 245a.3(b)(4)(i)(A) of this chapter in order to be granted lawful permanent residence provided they are otherwise eligible. Evidence of "Satisfactory Pursuit" may be submitted at the time of filing Form I-698, subsequent to filing the application but prior to the interview, or at the time of the interview (the applicant's name and A90M number must appear on any such evidence submitted). An applicant need not necessarily be enrolled in a recognized course of study at the time of application for permanent residency.

(v) Enrollment in a recognized course of study as defined in § 245a.3(b)(5) and issuance of a "Certificate of Satisfactory Pursuit" must occur subsequent to May 1, 1987.

(5) A course of study in the English language and in the history and government of the United States

shall satisfy the requirement of paragraph (b)(4)(i) of this section if the course materials for such instruction include textbooks published under the authority of section 346 of the Act, and it is

(i) Sponsored or conducted by: (A) An established public or private institution of learning recognized as such by a qualified state certifying agency; (B) An institution of learning approved to issue Forms I-20 in accordance with § 214.3 of this chapter; (C) A qualified designated entity within the meaning of section 245A(c)(2) of the Act, in goodstanding with the Service; or (D) Is certified by the district director in whose jurisdiction the program is conducted, or is certified by the Director of the Outreach Program nationally.

(ii) A program seeking certification as a course of study recognized by the Attorney General under paragraph (b)(5)(i)(D) of this section shall file Form I-803, Petition for Attorney General Recognition to Provide Course of Study for Legalization: Phase II, with the Director of Outreach for national level programs or with the district director having jurisdiction over the area in which the school or program is located. In the case of local programs, a separate petition must be filed with each district director when a parent organization has schools or programs in more than one INS district. A petition must identify by name and address those schools or programs included in the petition. No fee shall be required to file Form I-803;

(A) The Director of Outreach and the district directors may approve a petition where they have determined that (*1*) a need exists for a course of study in addition to those already certified under § 245a.3(b)(5)(i)(A), (B), or (C); and/or (*2*) of this chapter the petitioner has historically provided edu-

cational services in English and U.S. history and government but is not already certified under § 245a.3 (b)(5)(i)(A), (B), or (C); and (*3*) of this chapter the petitioner is otherwise qualified to provide such course of study;

(B) Upon approval of the petition the Director of Outreach and district directors shall issue a Certificate of Attorney General Recognition on Form I-804 to the petitioner. If the petition is denied, the petitioner shall be notified in writing of the decision therefor. No appeal shall lie from a denial of Form I-803, except that in such case where the petitions of a local, cross-district program are approved in one district and denied in another within the same State, the petitioner may request review of the denied petition by the appropriate Regional Commissioner. The Regional Commissioner shall then make a determination in this case;

(C) Each district director shall compile and maintain lists of programs approved under paragraph (b)(5)(i)(D) of this section within his or her jurisdiction. The Director of Outreach shall compile and maintain lists of approved national level programs.

(6) *Notice of participation.* All courses of study recognized under § 245a.3(b)(5)(i)(A) through (C) of this chapter which are already conducting or will conduct English and U.S. history and government courses for temporary residents must submit a Notice of Participation to the district director in whose jurisdiction the program is conducted. Acceptance of "Certificates of Satisfactory Pursuit" (Form I-699) shall be delayed until such time as the course provider submits the Notice of Participation, which notice shall be in the form of a letter typed on the letterhead of the course provider (if available) and include the following:

(i) The name(s) of the school(s)/program(s).

(ii) The complete addresses and telephone numbers of sites where courses will be offered, and class schedules.

(iii) The complete names of persons who are in charge of conducting English and U.S. history and government courses of study.

(iv) A statement that the course of study will issue "Certificates of Satisfactory Pursuit" to temporary resident enrollees according to INS regulations.

(v) A list of designated officials of the recognized course of study authorized to sign "Certificates of Satisfactory Pursuit", and samples of their original signatures.

(vi) A statement that if a course provider charges a fee to temporary resident enrollees, the fee will not be excessive.

(vii) Evidence of recognition under 8 CFR 245a.3 (b)(5)(i)(A), (B), or (C) (e.g., certification from a qualified state certifying agency; evidence of INS approval for attendance by non-immigrant students, such as the school code number, or the INS identification number from the QDE cooperative agreement).

The course provider shall notify the district director, in writing, of any changes to the information contained in the Notice of Participation subsequent to its submission within ten (10) days of such change.

A Certificate of Attorney General Recognition to Provide Course of Study for Legalization (Phase II), Form I-804, shall be issued to course providers who have submitted a Notice of Participation in accordance with the provisions of this section by the district director. A Notice of Participation deficient in any way shall be returned to the course provider to cor-

rect the deficiency. Upon the satisfaction of the district director that the deficiency has been corrected, the course provider shall be issued Form I-804. Each district director shall compile and maintain lists of recognized courses within his or her district.

(7) *Fee structure.* No maximum fee standard will be imposed by the Attorney General. However, if it is believed that a fee charged is excessive, this factor alone will justify non-certification of the course provider by INS as provided in § 245a.3(b)(10) and or (12) of this section. Once fees are established, any change in fee without prior approval of the district director or the Director of Outreach may justify decertification. In determining whether or not a fee is excessive, district directors and the Director of Outreach shall consider such factors as the means of instruction, class size, prevailing wages of instructors in the area of the program, and additional costs such as rent, materials, utilities, insurance, and taxes. District directors and the Director of Outreach may also seek the assistance of various Federal, State and local entities as the need arises (e.g., State Departments of Education) to determine the appropriateness of course fees.

(8) The Citizenship textbooks to be used by applicants for lawful permanent residence under section 245A of the Act shall be distributed by the Service to appropriate representatives of public schools. These textbooks may otherwise be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, and are also available at certain public institutions.

(9) *Maintenance of Student Records.* Course providers conducting courses of study recognized under § 245a.3(b)(5) of this chapter shall maintain for each student, for a period of three years from the stu-

dent's enrollment, the following information and documents:

(i) Name (as copied exactly from the I-688A or I-688);

(ii) A-number (90 million series);

(iii) Date of enrollment;

(iv) Attendance records;

(v) Assessment records;

(vi) Photocopy of signed "Certificate of Satisfactory Pursuit" issued to the student.

(10) *Issuance of "Certificate of Satisfactory Pursuit" (I-699).* (i) Each recognized course of study shall prepare a standardized certificate that is signed by the designated official. The Certificate shall be issued to an applicant who has attended a recognized course of study for at least 40 hours of a minimum of 60-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English and U.S. history and government course prescribed. Such standards shall conform with the provisions of § 245a.1(s) of this chapter.

(ii) The district director shall reject a certificate if it is determined that the certificate is fraudulent or was fraudulently issued.

(iii) The district director shall reject a Certificate if it is determined that the course provider is not complying with INS regulations. In the case of noncompliance, the district director will advise the course provider in writing of the specific deficiencies and give the provider thirty (30) days within which to correct such deficiencies.

(iv) District directors will accept Certificates from course providers once it is determined that the deficiencies have been satisfactorily corrected.

(v) Course providers which engage in fraudulent activities or fail to conform with INS regulations will be removed from the list of INS approved programs. INS will not accept Certificates from these providers.

(vi) Certificates may be accepted if a program is cited for deficiencies or decertified at a later date and no fraud was involved.

(vii) Certificates shall not be accepted from a course provider that has been decertified unless the alien enrolled in and had been issued a certificate prior to the decertification, provided that no fraud was involved.

(viii) The appropriate State agency responsible for SLIAG funding shall be notified of all decertifications by the district director.

(11) *Designated official.* (i) The designated official is the authorized person from each recognized course of study whose signature appears on all "Certificates of Satisfactory Pursuit" issued by that course;

(ii) The designated official must be a regularly employed member of the school administration whose office is located at the school and whose compensation does not come from commissions for recruitment of foreign students;

(iii) (A) The head of the school system or school, the director of the Qualified Designated Entity, the head of a program approved by the Attorney General, or the president or owner of other institutions recognized by the Attorney General must specify a *designated official.* Such designated official may not delegate this designation to any other person. Each school or institution may have up to three (3) designated officials at any one time. In a multi-campus institution, each campus may have up to three (3) designated officials at any one time;

(B) Each designated official shall have read and otherwise be familiar with the "Requirements and Guidelines for Courses of Study Recognized by the Attorney General". The signature of a designated official shall affirm the official's compliance with INS regulations;

(C) The name, title, and sample signature of each designated official for each recognized course of study shall be on file with the district director in whose jurisdiction the program is conducted.

(12) *Monitoring by INS.* (i) INS Outreach personnel in conjunction with the district director shall monitor the course providers in each district in order to:

(A) Assure that the program is a course of study recognized by the Attorney General under the provisions of § 245a.3(b)(5).

(B) Verify the existence of curriculum as defined in § 245a.1(u) on file for each level of instruction provided in English language and U.S. history and government classes.

(C) Assure that "Certificates of Satisfactory Pursuit" are being issued in accordance with § 245.3(b)(10).

(D) Assure that records are maintained on each temporary resident enrollee in accordance with § 245a.3(b)(9).

(E) Assure that fees (if any) assessed by the course provider are in compliance in accordance with § 245a.3(b)(7).

(ii) If INS has reason to believe that the service is not being provided to the applicant, INS will issue a 24-hour minimum notice to the service provider before any site visit is conducted.

(iii) If it is determined that a course provider is not performing according to the standards established in either § 245a.3(b)(10) or (12) of this chapter, the district director shall institute decertification proceedings. Notice of Intent to Decertify shall be provided to the course provider. The course provider has 30 days within which to correct performance according to standards established. If after the 30 days, the district director is not satisfied that the basis for decertification has been overcome, the course provider will be decertified. The appropriate State agency shall be notified in accordance with § 245a.3(b)(10)(viii) of this chapter. A copy of the notice of decertification shall be sent to the State agency.

(13) Courses of study recognized by the Attorney General as defined at § 245a.3(b)(5) of this chapter shall provide certain standards for the selection of teachers. Since some programs may be in locations where selection of qualified staff is limited, or where budget constraints restrict options, the following list of qualities for teacher selection is provided as guidance. Teacher selections should include as many of the following qualities as possible:

(i) Specific training in Teaching English to Speakers of Other Languages (TESOL);

(ii) Experience as a classroom teacher with adults;

(iii) Cultural sensitivity and openness;

(iv) Familiarity with competency-based education;

(v) Knowledge of curriculum and materials adaption;

(vi) Knowledge of a second language.

(c) *Ineligible aliens.* (1) An alien who has been convicted of a felony, or three or more misdemeanors in the United States.

(2) An alien who is inadmissible to the United States as an immigrant, except as provided in § 245a.3(g)(1).

(3) An alien who was previously granted temporary resident status pursuant to section 245A(a) of the Act who has not filed an application for permanent resident status under section 245A(b)(1) of the Act by the end of 43 months from the date of actual approval of the temporary resident application.

(4) An alien who was not previously granted temporary resident status under section 245A(a) of the Act.

(5) An alien whose temporary resident status has been terminated under § 245a.2(u) of this chapter.

(d) *Filing the application.* The provisions of part 211 of this chapter relating to the documentary requirements for immigrants shall not apply to an applicant under this part.

(1) The application must be filed on Form I-698. The application will be mailed to the designated Regional Processing Facility having jurisdiction over the applicant's residence. Form I-698 must be accompanied by the correct fee and documents specified in the instructions.

(2) *Certification of documents.* The submission of original documents is not required at the time of filing Form I-698. A copy of a document submitted in support of Form I-698 filed pursuant to section 245A(b) of the Act and this part may be accepted, though unaccompanied by the original, if the copy is certified as true and complete by

(i) An attorney in the format prescribed in § 204.2(j)(1) of this chapter; or

(ii) An alien's representative in the format prescribed in § 204.2(j)(2) of this chapter; or

(iii) A qualified designated entity (QDE) in good standing as defined in § 245a.1(r) of this chapter, if the copy bears a certification by the QDE in good-standing, typed or rubber-stamped in the following language:

I certify that I have compared this copy with its original and it is a true and complete copy.

Signed: _____

Date: _____

Name: _____

QDE in good-standing representative

Name of QDE in good-standing: _____

Address of QDE in good-standing: _____

INS-QDE Cooperative Agreement Number: _____

(iv) *Authentication.* Certification of documents must be authenticated by an original signature. A facsimile signature on a rubber stamp will not be acceptable.

(v) *Original documents.* Original documents must be presented when requested by the Service. Official government records, employment or employment-related records maintained by employers, unions, or collective bargaining organizations, medical records, school records maintained by a school or school board or other records maintained by a party other than the applicant which are submitted in evidence must

be certified as true and complete by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. At the discretion of the district director and/or the Regional Processing Facility director, original documents may be kept for forensic examination.

(3) A separate application (I-698) must be filed by each eligible application. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check or certified bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(4) Applicants who filed for temporary resident status prior to December 1, 1987, are required to submit the results of a serologic test for HIV virus on Form I-693, "Medical Examination of Aliens Seeking Adjustment of Status", completed by a designated civil surgeon, unless the serologic test for HIV was performed and the results were submitted on Form I-693 when the applicant filed for temporary resident status. Applicants who did submit an I-693 reflecting a serologic test for HIV was performed prior to December 1, 1987, must submit evidence of this fact when filing the I-698 application in order to be relieved from the requirement of submitting another I-693. If such evidence is not available, applicants may note on their I-698 application their prior submission of the results of the serologic test for HIV. This information shall then be verified at the Regional Processing Facility. Applicants having to submit an I-693 pursuant to this section are not required to have a complete medical examination. All HIV-positive applicants shall be advised that a waiver of the ground of excludability under section 212(a)(6) of the Act

is available and shall be provided the opportunity to apply for the waiver. To be eligible for the waiver, the applicant must establish that:

(i) The danger to the public health of the United States created by the alien's admission to the United States is minimal.

(ii) The possibility of the spread of the infection created by the alien's admission to the United States is minimal, and

(iii) There will be no cost incurred by any government agency without prior consent of that agency. Provided these criteria are met, the waiver may be granted only for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest in accordance with § 245a.3(g)(2) of this chapter.

(5) If necessary, the validity of an alien's temporary resident card (I-688) will be extended in increments of one (1) year until such time as the decision on an alien's properly filed application for permanent residence becomes final.

(6) An application lacking the proper fee or incomplete in any way shall be returned to the applicant with request for the proper fee, correction, additional information, and or documentation. Once an application has been accepted by the Service and additional information and or documentation is required, the applicant shall be sent a notice to submit such information and or documentation. In such case the application Form I-698 shall be retained at the RPF. If a response to this request is not received within 60 days, a second request for correction, additional information, and/or documentation shall be made. If the second request is not complied with by the end of 43 months from the date the application for temporary residence, Form I-687, was approved the application for permanent residence will be adjudicated on the basis of the existing record.

(e) *Interview.* Each applicant regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of Form I-551. Each applicant shall be interviewed by an immigration officer, except that the adjudicative interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant. An applicant failing to appear for the scheduled interview may, for good cause, be afforded another interview. Where an applicant fails to appear for two scheduled interviews, his or her application shall be held in abeyance until the end of 30 months from the date the application for temporary residence was approved and adjudicated on the basis of the existing record.

(f) *Numerical limitations.* The numerical limitations of sections 201 and 202 of the Act do not apply to the adjustment of aliens to lawful permanent resident status under section 245A(b) of the Act.

(g) *Applicability of exclusion grounds.*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for adjustment of status from temporary resident to permanent resident status; (14) workers entering without labor certification; (20) immigrants not in possession of valid entry documents; (21) visas issued without compliance of section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of excludability.* Except as provided in paragraph (g)(3) of this section, the Service may waive any provision of section 212(a)

of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is otherwise in the public interest. In any case where a provision of section 212(a) of the Act has been waived in connection with an alien's application for lawful temporary resident status under section 245A(a) of the Act, no additional waiver of the same ground of excludability will be required when the alien applies for permanent resident status under section 245A(b)(1) of the Act. In the event that the alien was excludable under any provision of section 212(a) of the Act at the time of temporary residency and failed to apply for a waiver in connection with the application for temporary resident status, or becomes excludable subsequent to the date temporary residence was granted, a waiver of the ground of excludability, if available, will be required before permanent resident status may be granted.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provisions of the Act the following provisions of section 212(a) of the Act may not be waived by the Attorney General under paragraph (g)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (15) (public charge) except for an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act);

(iii) Paragraph (23) (narcotics), except for a single offense of simple possession of thirty grams or less of marijuana;

(iv) Paragraphs (27) (prejudicial to the public interest), (28) (communists), and (29) (subversives);

(v) Paragraph (33) (participated in Nazi persecution).

(4) *Determination of Likely to become a public charge* and Special Rule. Prior to use of the special rule for determination of public charge, paragraph (g)(4)(iii) of this section, an alien must first be determined to be excludable under section 212(a)(15) of the Act. If the applicant is determined to be *likely to become a public charge*, he or she may still be admissible under the terms of the Special Rule.

(i) In determining whether an alien is *likely to become a public charge* financial responsibility of the alien is to be established by examining the totality of the alien's circumstances at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income, and vocation.

(ii) The Special Rule for determination of public charge, paragraph (g)(4)(iii) of this section, is to be applied only after an initial determination that the alien is inadmissible under the provisions of section 212(a)(15) of the act.

(iii) *Special Rule.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable under paragraph (g)(3)(ii) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. The Special Rule is prospective in that the Service shall determine, based on the alien's

history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(5) *Public cash assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and or has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for proper adjudication may result in denial of the application.

(h) *Departure.* An applicant for adjustment to lawful permanent resident status under section 245A (b)(1) of the Act who was granted lawful temporary resident status under section 245A(a) of the Act, shall be permitted to return to the United States after such brief and casual trips abroad, as long as the alien reflects a continuing intention to adjust to lawful permanent resident status. However, such absences from the United States must not exceed the periods of time specified in § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

(i) *Decision.* The applicant shall be notified in writing of the decision, and, if the application is denied, of the reason therefor. Applications for permanent residence under this chapter will not be denied at

local INS offices (districts, suboffices, and legalization offices) until the entire record of proceeding has been reviewed. An application will not be denied if the denial is based on adverse information not previously furnished to the Service by the alien without providing the alien an opportunity to rebut the adverse information and to present evidence in his or her behalf. If inconsistencies are found between information submitted with the adjustment application and information previously furnished to the Service, the applicant shall be afforded the opportunity to explain discrepancies or rebut any adverse information. A party affected under this part by an adverse decision is entitled to file an appeal on Form I-694. If an application is denied, work authorization will be granted until a final decision has been rendered on an appeal or until the end of the appeal period if no appeal is filed. An applicant whose appeal period has ended is no longer considered to be an Eligible Legalized Alien for the purposes of the administration of State Legalization Impact Assistance Grants (SLIAG) funding. An alien whose application is denied will not be required to surrender his or her temporary resident card (I-688) until such time as the appeal period has tolled, or until expiration date of the I-688, whichever date is later. After exhaustion of an appeal, an applicant who believes that the grounds for denial have been overcome may submit another application with fee, provided that the application is submitted within his or her eligibility period.

(j) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit) the appellate authority designated in § 103.1(f)(2). Any appeal shall be submitted to the Regional Processing

Facility with the required fee within thirty (30) days after service of the Notice of Denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the thirty (30) day period has tolled will not be accepted. The thirty (30) day period for submitting an appeal begins three days after the notice of denial is mailed. If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional thirty (30) days will be allowed for this review from the time the Record of Proceeding is photocopied and mailed. A brief may be submitted with the appeal form or submitted up to thirty (30) calendar days from the date of receipt of the appeal form at the Regional Processing Facility. Briefs filed after submission of the appeal should be mailed directly to the Regional Processing Facility. For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Director of the Regional Processing Facility.

(k) *Motions.* The Regional Processing Facility director may reopen and reconsider any adverse decision *sua sponte.* When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision that will grant the benefit which has been requested. The director's new decision must be served on the appealing party within forty-five (45) days of receipt of any briefs and or new evidence, or upon expiration of the time allowed for the submission of any briefs.

(l) *Certifications.* The Regional Processing Facility director or district director may, in accordance with § 103.4 of this chapter, certify a decision to the

Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remanded back to either the Regional Processing Facility director or the district director will be certified to the Administrative Appeals Unit.

(m) *Date of adjustment to permanent residence.* The status of an alien whose application for permanent resident status is approved shall be adjusted to that of a lawful permanent resident as of the date of the filing of the application for permanent residence or the eligibility date, whichever is later. For purposes of making application to petition for naturalization, the continuous residence requirements for naturalization shall begin as of the date the alien's status is adjusted to that of a person lawfully admitted for permanent residence under this part.

(n) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Department of Justice or bureau of agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(2) No information furnished pursuant to an application for permanent resident status under this section shall be used for any purpose except: (i) To make a determination on the application; or (ii) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (n)(3) of this section.

(3) If a determination is made by the Service that the alien has, in connection with his or her application,

engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien and/or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(4) Information contained in granted legalization files may be used by the Service at a later date to make a decision (i) On an immigrant visa petition or other status filed by the applicant under section 204(a) of the Act; (ii) On a naturalization application submitted by the applicant; (iii) For the preparation of reports to Congress under section 404 of IRCA, or; (iv) For the furnishing of information, at the discretion of the Attorney General, in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13, United States Code.

(o) *Rescission.* Rescission of adjustment of status under 245a shall occur under the guidelines established in section 246 of the Act.

[54 FR 29449, July 12, 1989; 54 FR 43384, Oct. 24, 1989; as amended at 56 FR 31061, July 9, 1991]

§ 245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

(a) *Definitions.* As used in this section: (1) *Act* means the Immigration and Nationality Act, as

amended by the Immigration Reform and Control Act of 1986.

(2) *Service* means the Immigration and Naturalization Service (INS).

(3) *Resided continuously* means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

(i) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application. An alien who, after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States pursuant to the stateside criteria program, shall be considered as having *resided continuously.*

(4) *Continuous residence* means that the alien shall be regarded as having resided continously [*sic*] in the United States if, at the time of applying for adjust-

ment from temporary residence to permanent resident status: No single absence from the United States has exceeded 30 days, and the aggregate of all absences has not exceeded 90 days between the date on which lawful temporary resident status was granted and the date permanent resident status was applied for, unless the alien can establish that due to emergent reasons or extenuating circumstances beyond his or her control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than 30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent resident status, shall break the continuity of such residence unless the temporary resident can establish to the satisfaction of the district director that he or she did not, in fact, abandon his or residence in the United States during such period.

(5) *To make a determination* means obtaining and reviewing all information required to adjudicate an application for the benefit sought and making a decision thereon. If fraud, willful misrepresentation or concealment of a material fact, knowingly providing a false writing or document, knowingly making a false statement or representation, or any other activity prohibited by the Act is established during the process of making the determination on the application, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(6) *Continuous physical presence* means actual continuous presence in the United States since December

22, 1987, until filing of any application for adjustment of status. Aliens who were outside of the United States after enactment may apply for temporary residence if they reentered prior to March 21, 1988, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.

(7) *Brief, casual, and innocent* means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, for not more than 30 days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(8) *Brief and casual* means temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must not exceed the specific periods of time required in order to maintain continuous residence.

(9) *Certain nationals of countries for which extended voluntary departure has been made available on the basis of a nationality group determination at any time during the 5-year period ending on November 1, 1987* is limited to nationals of Poland, Afghanistan, Ethiopia, and Uganda.

(10) *Public cash assistance* means income or need-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

(11) *Designated entity* means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for legalization status.

(12) *Through the passage of time* means through the expiration date of the nonimmigrant permission to remain in the United States, including any extensions and or change of status.

(13) *Prima facie eligibility* means eligibility is established if the applicant presents a completed I-687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part.

(b) *Application for temporary residence*—(1) *Application for temporary residence.* (i) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan who has resided continuously in the United States since prior to July 21, 1984, and who believes that he or she meets the eligibility requirements of section 245A of the Act must make application within the 21-month period beginning on March 21, 1988, and ending on December 22, 1989.

(ii) An alien who fails to file an application for adjustment of status to that of a temporary resident under § 245A.4 of this part during the time period, will be statutorily ineligible for such adjustment of status.

(2) *Eligibility* (i) The following categories of aliens who are not otherwise excludable under section 212(a) of the Act are eligible to apply for status to that of a person admitted for temporary residence:

(A) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, (other than an alien who

entered as a nonimmigrant) who establishes that he or she entered the United States prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(B) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and whose period of authorized admission expired through the passage of time prior to January 21, 1985, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(C) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and who applied for asylum prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(D) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, who would otherwise be eligible for temporary resident status and who establishes that he or she resided continuously in the United States prior to July 21, 1984, and who subsequently reentered the United States as a nonimmigrant in order to return to an unrelinquished residence. An alien described in this paragraph must have received a waiver of 212(a)(19) as an alien who entered the United States by fraud.

(E) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and was a nonimmigrant who entered the United States in the classification A, A-1, A-2, G, G-1, G-2, G-3, or G-4, for Duration of Status (D/S), and whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 21, 1985, and who thereafter continued to reside in the United States.

(F) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and who was a nonimmigrant who entered the United States as an F, F-1 or F-2 for Duration of Status (D/S), and who completed a full course of studies, including practical training (if any), and whose time period to depart the United States after completion of studies expired prior to January 21, 1985, and who has thereafter continued to reside in the United States. Those students placed in a *nunc pro tunc* retroactive student status which would otherwise preclude their eligibility for legalization under this section, must present evidence that they had otherwise terminated their status during the requisite time period. A dependent F-2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I-94, Arrival-Departure Record that extended beyond July 21, 1984 is considered eligible if the principal F-1 alien is found eligible.

(3) *Ineligible aliens.* (i) An alien who has been convicted of a felony, or three or more misdemeanors.

(ii) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion.

(iii) An alien excludable under the provisions of section 212(a) of the Act whose grounds of excludability may not be waived.

(4) *Documentation.* Evidence to support an alien's eligibility for temporary resident status shall include documents establishing proof of identity, proof of nationality, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD-258), and a completed medical report of examination (Form I-693). All documentation submitted will be subject to Service verification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for the four categories of documentation are discussed as follows:

(i) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference;

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Driver's license or similar document issued by a state if it contains a photo;

(E) Baptismal Record/Marriage Certificate; or

(F) Affidavits.

(ii) *Proof of nationality.* Evidence to establish nationality is listed as follows:

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Other credible documents, including those created by, or in the possession of the INS, or any other documents (excluding affidavits) that, when taken singly, or together as a whole, establish the alien's nationality.

(iii) *Assumed names*—(A) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (b)(4)(i) and (ii) of this section. The assumed name must appear in the documentation provided by the applicants to establish eligibility. To meet the requirement of this paragraph, documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(B) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint, or detailed physical description. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to the affiant under the assumed name in question will carry greater weight.

(iv) *Proof of residence.*—Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(A) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, a state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organizations must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(1) Alien's address at the time of employment;

(2) Exact period of employment;

(3) Periods of layoff;

(4) Duties with the company;

(5) Whether or not the information was taken from official company records; and

(6) Where records are located, whether the Service may have access to the records.

If the records are unavailable, an affidavit form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of paragraphs (b)(4)(iv)(A)(*5*) and (*6*) of this section. This affidavit form letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's will-

ingness to come forward and give testimony if requested.

(B) Utility bills (gas, electric, phone, etc.) receipts, or letters from companies showing the dates during which the applicants received service are acceptable documentation.

(C) School records (letters, report cards, etc.) from the schools that the applicant or his or her children have attended in the United States must show the name of school and periods of school attendance.

(D) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(E) Attestations by churches, unions, or other organizations as to the applicant's residence by letter which:

(1) Identify applicant by name;

(2) Are signed by an official (whose title is shown);

(3) Show inclusive dates of membership;

(4) State the address where applicant resided during membership period;

(5) Include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(6) Establish how the author knows the applicant; and

(7) Establish the origin of the information being attested to.

(F) Additional documents to support the applicant's claim may include:

(1) Money order receipts for money sent into or out of the country;

(2) Passport entries;

(3) Birth certificates of children born in the United States;

(4) Bank books with dated transactions;

(5) Letters or correspondence between applicant and other person or organization;

(6) Social Security card;

(7) Selective Service card;

(8) Automobile license receipts, title, vehicle registration, etc.;

(9) Deeds, mortgages, contracts to which applicant has been a party;

(10) Tax receipts;

(11) Insurance policies, receipts, or letters; and

(12) Any other relevant document.

(v) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the Special Rule under paragraph (b)(11)(iv)(C) of this section will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(A) Evidence of a history of employment (i.e., employment letter, W-2 forms, income tax returns, etc.);

(B) Evidence that he she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(C) Form I-134. Affidavit of Support, completed by a spouse on behalf of the applicant and or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the Affidavit of Support shall be extended to other family members in unusual family circumstances.

Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

(vi) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification.

(vii) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

(5) *Filing of application.* (i) The application must be filed on Form I-687 at an office of a designated entity or at a Service office within the jurisdiction of the district where the applicant resides. If the application is filed with a designated entity, the alien must have consented to having the designated entity forward the application to the Service office. In the case of applications filed at a Service office, the district director may, at his or her discretion:

(A) Require the applicant to file the application in person; or

(B) Require the applicant to file the application by mail; or

(C) Permit the filing of applications whether by mail or in person.

The applicant must appear for a personal interview at the Service office as scheduled. If the applicant is 14 years of age or older, the application must be accompanied by a completed Form FD-258 (Applicant Card).

(ii) At the time of the interview, whenever possible, original documents must be submitted except the following: Official government records; employment or employment-related records maintained by employers, union, or collective bargaining organizations; medical records; school records maintained by

a school or school board; or other records maintained by a party other than the applicant. Copies of records maintained by parties other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. If at the time of the interview the return of the original document is desired by the applicant, the document must be accompanied by notarized copies or copies certified true and correct by a qualified designated entity or by the alien's representative in the format prescribed in § 204.2(j)(1) or (2) of this chapter. At the discretion of the district director, original documents, even if accompanied by certified copies, may be temporarily retained for forensic examination by the Document Analysis Unit at the Regional Processing Facility having jurisdiction over the Service office to which the documents were submitted.

(iii) A separate application (I-687) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check, or certified bank check, made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(6) *Filing date of application.* The date the alien submits a completed application to a Service office or designated entity shall be considered the filing date of the application, provided that in the case of an application filed at a designated entity the alien has consented to having the designated entity forward the application to the Service office having jurisdiction

over the location of the alien's residence. Designated entities are required to forward completed applications to the appropriate Service office within 60 days of receipt.

(7) *Selective Service registration.* At the time of filing an application under this section, male applicants over the age of 17 and under the age of 26, are required to be registered under the Military Selective Service Act. An applicant shall present evidence that he has previously registered under that Act in the form of a letter of acknowledgement from the Selective Service System, or such alien shall present a completed and signed Form SSS-1 at the time of filing Form I-687 with the Immigration and Naturalization Service or a designated entity. Form SSS-1 will be forwarded to the Selective Service System by the Service.

(8) *Continuous residence.* (i) For the purpose of this Act, an applicant for temporary residence status shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(A) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(B) The alien was maintaining a residence in the United States; and

(C) The alien's departure from the United States was not based on an order of deportation.

(ii) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

(9) *Medical examination.* (i) An applicant under this part shall be required to submit to an examination by a designated civil surgeon at no expense to the government. The designated civil surgeon shall report on the findings of the mental and physical condition of the applicant and the determination of the alien's immunization status on Form I-693, "Medical Examination of Aliens Seeking Adjustment of Status, (Pub. L. 99-603)". Results of the medical examination must be presented to the Service at the time of interview and shall be incorporated into the record. Any applicant certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

(ii) All applicants who filed for temporary resident status are required to include the results of a serological test for the HIV virus on the I-693. All HIV-positive applicants shall be advised that a waiver is available and shall be provided with the opportunity to apply for a waiver.

(10) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of Forms I-688A and I-688. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14 years of age, or when it is impractical because of the health or advanced age of the applicant.

(11) *Applicability of exclusion grounds.* (i) *Grounds of exclusion not to be applied.* Paragraphs (14), (workers entering without labor certification); (20), (immigrants not in possession of a valid entry document); (21), (visas issued without compliance with section 203); (25), (illiterates); and (32) (graduates of non-accredited medical schools) of section 212(a) of the Act shall not apply to applicants for temporary resident status.

(ii) *Waiver of grounds of exclusion.* Except as provided in paragraph (b)(11)(iii) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the Service office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the Service office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the

director of the Regional Processing Facility in whose jurisdiction the alien's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefore. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of section 103.3(a) of this chapter.

(iii) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (b)(11)(ii) of this section:

(A) Paragraphs (9) and (10) (criminals);

(B) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(C) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(D) Paragraph (33) (participated in Nazi persecution).

(iv) *Determination of Likely to become a public charge* and the special rule. (A) Prior to use of the special rule for determination of public charge, an alien must first be determined to be excludable under section 212(a)(15) of the Act. If the applicant is determined to be *likely to become a public charge*, he or she may still be admissible under the terms of the Special Rule.

(B) In determining whether an alien is *likely to become a public charge*, financial responsibility of the alien is to be established by examining the totality of the alien's circumstances at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income and vocation.

(C) An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level may be admissible under this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. The Special Rule is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(v) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and/or

has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

(12) *Continuous physical presence since December 22, 1987.* (i) An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since December 22, 1987. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to March 21, 1988, and meet the continuous residence requirements and are otherwise eligible for legalization.

(ii) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(13) *Departure.* (i) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service office and the date status as a temporary resident is granted, the alien application can be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in § 212.5(e) of this chapter.

(ii) An alien whose application for temporary resident status has been approved may be admitted to the

United States upon return as a returning temporary resident provided he or she:

(A) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(B) Has not been absent from the United States for more than 30 days on the date application for admission is made;

(C) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(D) Presents Form I-688;

(E) Presents himself or herself for inspection; and

(F) Is otherwise admissible.

(iii) The periods of time in paragraphs (b)(13)(ii)(B) and (C) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief and casual trip abroad due to emergent or extenuating circumstances beyond the alien's control.

(14) *Employment and travel authorization.*—(i) *General.* Authorization for employment and travel abroad for temporary resident status applicants under this section may be granted only by a Service office. INS district directions will determine the Service location for the completion of processing travel documentation. In the case of an application which has been filed with a designated entity, employment authorization may be granted by the Service only after the application has been properly received at the Service office.

(ii) *Employment and travel authorization prior to the granting of temporary resident status.* (A) Permission to travel abroad and accept employment may be granted to the applicant after an interview has been conducted in connection with an application establishing prima facie eligibilty for temporary resident status. Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in § 212.5(e) of this chapter after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status.

(B) If an appointment cannot be scheduled within 30 days, authorization to accept employment will be granted, valid until the scheduled appointment date. The appointment letter will be endorsed with the temporary employment authorization. Form I-688A, Employment Authorization, will be given to the applicant after an interview has been completed by an immigration officer unless a formal denial is issued by a Service office. This temporary employment authorization will be restricted to six-months duration, pending final determination on the application for temporary resident status.

(iii) *Employment and travel authorization upon grant of temporary resident status.* Upon grant of an application for adjustment to temporary resident status by a Regional Processing Facility, the processing facility will forward a notice of approval to the alien at his or her last known address, or to his or her legal representative. The alien will be required to return to the Service office where the application was initially received, surrender the I-688A previously issued, and obtain Form I-688, Temporary Resident Card, authorizing employment and travel abroad.

(iv) *Revocation of employment authorization upon denial of temporary resident status.* Upon denial of an application for adjustment to temporary resident status, the alien will be notified that if a timely appeal is not submitted, employment authorization shall be automatically revoked on the final day of the appeal period. An applicant whose appeal period has ended is no longer considered to be an Eligible Legalized Alien for the purposes of the administration of State Legalization Impact Assistance Grants (SLIAG) funding.

(15) *Decision.* The applicant shall be notified in writing of the decision. If the application is denied, the reason(s) for the decision shall be provided to the applicant. An appeal from an adverse decision under this part may be taken by the applicant on Form I-694.

(16) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit), the appellate authority designated in § 103.1(f)(2). Any appeal shall be submitted to the Regional Processing Facility (RPF) with the required fee within 30 days after service of the Notice of Denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the 30-day period will not be accepted. The 30-day period for submission of an appeal begins three days after the Notice of Denial is mailed as provided in § 103.5a(b) of this Act. If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional 30 days will be allowed for this review beginning at the time the ROP is mailed. A brief may be submitted with the appeal form or submitted up to

30 calendar days from the date of receipt of the appeal form at the RPF. Briefs filed after submission of the appeal should be mailed directly to the RPF. For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Director of the Regional Processing Facility.

(17) *Motions.* The Regional Processing Facility director may *sua sponte* reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision granting the benefit which has been requested. The director's new decision must be served on the appealing party within 45 days of receipt of any briefs and/or new evidence, or upon expiration of the time allowed for the submission of any briefs. Motions to reopen a proceeding or reconsider a decision shall not be considered under this part.

(18) *Certifications.* The Regional Processing Facility director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remanded to the Regional Processing Facility director will be certified to the Administrative Appeals Unit.

(19) *Date of adjustment to temporary residence.* The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at the Service office.

(20) *Termination of temporary resident status.*—(i) *Termination of temporary resident status (General).* The status of an alien lawfully admitted for temporary residence under § 245a.4 of this part may be terminated at any time. It is not necessary that a final order of deportation be entered in order to terminate temporary resident status. The temporary resident status may be terminated upon the occurrence of any of the following:

(A) It is determined that the alien was ineligible for temporary residence under § 245a.4 of this part;

(B) The alien commits an act which renders him or her inadmissible as an immigrant unless a waiver is obtained, as provided in this part;

(C) The alien is convicted of any felony, or three or more misdemeanors;

(D) The alien fails to file for adjustment of status from temporary resident to permanent resident within 31 months of the date he or she was granted status as a temporary resident.

(ii) *Procedure.* Termination of an alien's status will be made only on notice to the alien sent by certified mail directed to his or her last known address, and, if applicable, to his or her representative. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within 30 days after the service of the Notice of Intent to Terminate. If the alien's status is terminated, the director of the Regional Processing Facility shall notify the alien of the decision and the reason for the termination, and further notify the alien that any Service Form issued to the alien authorizing employment and/or travel abroad, or any Form I-688, Temporary Resident Card previously

issued to the alien will be declared void by the director of the Regional Processing Facility within 30 days if no appeal of the termination decision is filed within that period. The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any-appeal along with the required fee, shall be filed with the Regional Processing Facility within 30 days after the service of the notice of termination. If no appeal is filed within that period, the official Service document shall be deemed void, and must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(iii) *Termination not construed as rescission under section 246.* For the purposes of this part the phrase *termination of status* of an alien granted lawful temporary residence under this section shall not be construed to necessitate a rescission of status as described in section 246 of the Act, and the proceedings required by the regulations issued thereunder shall not apply.

(iv) *Return to unlawful status after termination.* Termination of the status of any alien previously adjusted to lawful temporary residence shall act to return such alien to the status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under sections 236 or 242 of the Act, as appropriate.

(21) *Ineligibility for immigration benefits.* An alien whose status is adjusted to that of a lawful temporary resident under § 245a.4 of this part is not entitled to submit a petition pursuant to section 203 (a)(2), nor is such alien entitled to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence.

(22) *Declaration of intending citizen.* An alien who has been granted the status of temporary resident under § 245a.4 of this part may assert a claim of discrimination on the basis of citizenship status under section 274B of the Act only if he or she has previously filed Form I-772 (Declaration of Intending Citizen) after being granted such status. The Declaration of Intending Citizen is not required as a basis for filing a petition for naturalization; nor shall it be regarded as a right to United States citizenship; nor shall it be regarded as evidence of a person's status as a resident.

(23) *Limitation on access to information and confidentiality.* (i) No person other than a sworn officer or employee of the Department of Justice or bureau or agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(ii) No information furnished pursuant to an application for temporary or permanent resident status under this section shall be used for any purpose except:

(A) To make a determination on the application; or,

(B) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (b)(23)(iii) of this section.

(iii) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service

shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(iv) Information contained in granted legalization files may be used by the Service at a later date to make a decision on an immigrant visa petition (or other status petition) filed by the applicant under section 204(a), or for naturalization applications submitted by the applicant.

(c) *Adjustment from temporary to permanent resident status.* The provisions of § 245a.3 of this part shall be applied to aliens adjusting to permanent residence under this part.

[54 FR 6505, Feb. 13, 1989, as amended at 54 FR 29455, July 12, 1989; 54 FR 47676, Nov. 16, 1989]

§ 245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

(a) Except as provided in § 245a.5(b), any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 245A of the Act (Adjustment of Status of Certain Entrants Before January 1, 1982, to that of Person Admitted for Lawful Residence) or 210A of the Act (Determinations of Agricultural Labor Shortages and Admission of Additional Special Agricultural Workers) is ineligible, for a period of five years from the date such status was obtained, for benefits financed directly or indirectly, in whole or in part, through the programs identified in § 245a.5(c) of this chapter.

(b)(1) Section 245a.5(a) shall not apply to a Cuban or Haitian entrant (as defined in paragraph (1) or (2)(A) of section 501(e) of Pub. L. 96-422, as in effect on April 1, 1983), or in the case of assistance (other than aid to families with dependent children) which is furnished to an alien who is an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act).

(2) With respect to any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 210A of the Act only, assistance furnished under the Legal Services Corporation Act (42 U.S.C. 2996, et seq.) or Title V of the Housing Act of 1949 (42 U.S.C. 1471 et seq.) shall not be construed to be financial assistance referred to in § 245a.5(a).

(3) Section 245a.5(a) shall not apply to benefits financed through the programs identified in § 245a.5(c), which are marked with an asterisk (*), except to the extent that such benefits:

(i) Consist of, or are financed by, financial assistance in the form of grants, wages, loan, loan guarantees, or otherwise, which is furnished by the Federal Government directly, or indirectly through a State or local government or private entity, to eligible individuals or to private suppliers of goods or services to such individuals, or is furnished to a State or local government that provides to such individuals goods or services of a kind that is offered by private suppliers, and

(ii) Are targeted to individuals in financial need; either (A) in order to be eligible, individuals must establish that their income or wealth is below some maximum level, or, with respect to certain loan or loan guarantee programs, that they are unable to

obtain financing from alternative sources, or at prevailing interest rates, or at rates that would permit the achievement of programs goals, or (B) distribution of assistance is directed, geographically or otherwise, in a way that is intended to primarily benefit persons in financial need, as evidenced by references to such intent in the authorizing legislation.

(c) The programs of Federal financial assistance referred to in § 245a.5(a) are those identified in the list set forth below. The General Services Administration (GSA) Program Numbers set forth in the right column of the program list refer to the program identification numbers used in the Catalog of Federal Domestic Assistance, published by the United States General Services Administration, as updated through December, 1986.

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In The

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October Term, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

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CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. In a program designed to encourage those undocumented aliens who had long-resided in the U.S. to legalize their status, did Congress intend to preclude district court jurisdiction over statutory and constitutional class action challenges to invalid regulations that were used by INS to bar the filing of applications by large numbers of eligible undocumented aliens, thereby also, in violation of the statute, subjecting them to deportation and the inability to obtain employment authorization?

2. Did Congress preclude district courts from granting effective relief to parties illegally deemed ineligible to apply for legalization by INS regulations, policies and practices that thwarted the Congressional purpose of reallocating enforcement resources to the U.S. borders by maximizing the number of legalized aliens?

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EXPLANATION OF RECORD CITATION FORM

The following forms are used in this brief for citation to the record:

1. **Appendix to the Petition for Certiorari**: Citations to documents reprinted in the Appendix filed with the Petition for Certiorari are indicated by "PA".

2. **Joint Appendix**: Citations to the Joint Appendix are indicated by "JA".

3. **Clerk's Record in *Catholic Social Services v. Barr***: Citations to documents filed in the trial court in this case are indicated first by the designator "CRC" for "Clerk's Record--*CSS*", next by the docket number, and finally, by the page number within the specific document, when a specific page number is identified. Thus, a particular citation may be "CRC 27-17," indicating page 17 of the document identified in docket entry number 27 in *CSS*.

4. **Clerk's Record in *LULAC v. INS***: The same format as in citations to the Clerk's Record in *CSS* is followed, except the first designator is "CRL" for "Clerk's Record--*LULAC*".

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LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

INS' statement of the opinions below is erroneous in several respects. For the consolidated cases, the court of appeals opinion in both cases is reported at 956 F.2d 914, PA 1a-21a; and the partial stays are at PA 94a, 95a, 96a, and 97a-98a. In the first case (*CSS*): (1) there are two court of appeals opinions relating to the district court's TRO, JA 21-23, one at 820 F.2d 289 (1987), and one at JA 27-47; (2) the chief

opinion, and an order of the district court is at 685 F.Supp. 1149 (JA 54-77), and unreported orders granting further relief are at PA 22a-28a, 29a-33a, 40a-49a and CRC 61; (3) an unreported partial district court stay is at PA 34a-38a; (4) other related unreported orders are at JA 14-16 and 48a-51a (provisional and final class certification, respectively); and (5) a related opinion and order is at 664 F.Supp. 1378 (1987). In the second case: (1) the unreported district court opinion on the merits is at JA 211-34; (2) another unreported opinion and relief order is at PA 50a-60a.

STATEMENT OF THE CASE

A. Statutory Purpose and Structure of IRCA.

1. In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), P.L. 99-603, 99 Stat. 3359. During its 15-year legislative evolution, Congress had grappled with the dilemma that millions of aliens had entered the U.S. illegally, with a multiplicity of both positive and negative effects, *see* H. R. Rep. No. 682(I), 99th Cong., 2d Sess. 51-56 (1986) ("H. R. Rep."), yet it was clear that "mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage." *Id.* 49. Indeed, both the magnitude of the undocumented population and the seeming intractability of the problem was in major part due to our own "past failures to enforce[] the immigration laws...." *Id.*[1] Moreover, Congress

[1] See also *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982); 131 Cong. Rec. S11613 (daily ed. Sept. 17, 1985) ("We are not really doing much deporting of illegal undocumented persons who have U.S. citizen children ... We are not that kind of country." Remarks of Sen. Simpson, Senate floor manager of IRCA); Select Comm. On Imm. & Refugee Policy, Final Report, *U.S. Imm. Policy & the Nat. Int.*, (1981) at 13 ("[O]ur society has participated in the creation of the problem. Many undocumented/illegal migrants were induced to come to the [U.S.] by offers of work from U.S. employers who recruited and hired them under the protection of U.S. law"); Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law &*

recognized that "many who enter illegally do so for the best of motives--to seek a better life for themselves and their families ..." *Id.* As a result, they:

> have become a part of their communities. Many have strong family ties which include U.S. citizens and lawful residents....They have contributed to the [U.S.] in myriad ways, including providing their talents, labor and tax dollars. However, because of their...status, these people are afraid to seek help when their rights are violated, when they are victimized by criminals, employers, or landlords or when they become ill.

Id.[2]

The 15-year debate finally brought forth a twofold solution which forms the basic goals of IRCA. First, by increasing INS' enforcement capacity, particularly along the borders, and diminishing the magnetic attraction of U.S. employment by imposing sanctions on employers who hire undocumented workers, Congress sought to stem the tide of future illegal migration. 8 U.S.C. § 1324a(a), (e)-(f) (employer sanctions) (further citations are to Title 8, unless specified otherwise); H.R. Rep. 46-49, 56-62; P.L. 99-603, § 111, 100 Stat. 3359,

Policy, 28 U.C.L.A. L. Rev. 615, 639-72, 692-95 (1981) (analyzing 100-year U.S. history of active *de facto* and *de jure* promotion of immigration and lax enforcement of immigration laws); Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. Miami L. Rev. 819, 832 (1982) (failure of the government to control illegal immigration is due to demand for cheap labor, ethnic pressures, foreign policy and civil rights considerations, and cost concerns).

[2] See *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 891 and nn. 4-5 (1991) (hereafter, "*McNary*"), reprinting the full Congressional statement of purpose, only part of which is quoted in the text above.

The Administration shared Congress' perspective: "We must recognize the fact that some people, having entered this country illegally a substantial number of years ago, have set down roots here and become productive members of American society. We have to deal realistically with people whose long-standing presence here has demonstrated an abiding commitment to this country as productive and law-abiding residents." Statement of Attorney General Meese, H.R. Rep. 105.

3381 (providing for "increased funding ... [to] enhance INS' enforcement activities"). Then, Congress offered amnesty, the means by which long-term undocumented residents, the "shadow population," *McNary* 891, would surface from their clandestine status thus "allow[ing them] to contribute openly to society and ... help prevent the[ir] exploitation ..." H. R. Rep. 49, 63-66; S. Rep, No. 99-132, 99th Cong., 1st Sess. 3-8, 15-16 (1985) ("S. Rep.").[3] Through amnesty, limited INS enforcement resources could be sharply shifted from the nation's interior and concentrated more effectively on the borders to stem "new flows of undocumented aliens ..." H. R. Rep. 49; see also, *id.* 63-66. A full and "generous" amnesty program was viewed as "essential" and "a necessary part of an effective enforcement program ..." H. R. Rep. 49.

2. Several IRCA provisions strongly reflect Congress' belief that success in reaching these goals rested largely on maximizing the number of legalized aliens. That result would minimize the remaining undocumented population, simultaneously diminishing the resulting social problems and maximizing INS' ability to refocus enforcement staff on the borders. In this context, Congress insisted that the legalization program "*be implemented in a liberal and generous fashion* as has been the historical pattern with other forms of administrative relief granted by Congress. *Such implementation is necessary to ensure the true resolution of the problem* and to ensure that the program will be a one-time only program." *Id.* at 72 (emph. added).[4] Obviously, restrictive interpretation and implementation would leave large numbers of long-term undocumented residents

3 The other part of the legalization program, with shorter durational residence requirements, was established for Special Agricultural Workers, or "SAWs"; the key SAW eligibility factor is employment in farm labor for 90 days between May 1, 1985 and May 1, 1986. See *McNary, supra,* 111 S.Ct. at 891; § 1160(a)(1)(B)(ii); 8 C.F.R. § 210.3(a).

4 This statement reiterated the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (citations omitted).

in our midst, perpetuating a myriad of social ills and continuing to mire INS in the Nation's interior. See *McNary* 891, n. 4; *Perales v. Thornburgh,* 967 F.2d 798, 812-13 (2d Cir. 1992), *cert. pet. pend.*, No. 92-___.

Congress was keenly aware that formidable hurdles stood in the way of a successful legalization program. Congress studied what went wrong in the "legalization programs in other countries [which] have usually produced a low rate of participation among eligible candidates." *Id.* 73.

First was ignorance. To counteract it, Congress directed the Attorney General to "broadly disseminate information respecting the benefits which aliens may receive [by legalization] and the requirements to obtain such [legalization]." § 1255a(i). This "extensive education and outreach program" was designed to counteract the "lack of understanding among the undocumented population." H. R. Rep. 73.[5] INS's erroneous dissemination of information that class members were ineligible to apply for legalization is an important factor in these cases, as it was in parallel litigation. See, *e.g., Perales v. Thornburgh, supra,* 967 F.2d at 801, 804, 813-14; *Zambrano v. INS,* ___ F.2d ___, Nos. 89-16014, 90-15274, 90-15298 (9th Cir., Aug. 19, 1992).

Second was fear. Congress realized that many aliens understandably would be loath to approach INS to apply for legalization, because, during their long years in the "shadows," it was the most feared part of officialdom.[6] So, Congress enlisted buffering groups, called "Qualified Designated Entities"

5 Both the House and the Senate versions of IRCA contained similar provisions. See Conf. Comm. Rpt., H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. at 92-93, (1986). Significantly, however, the Senate version required only a three-month education and outreach period beginning on the effective date of the Act. *See* 131 Cong. Rec. S11763 (daily ed., Sept. 19, 1985). The Conferees' deletion of this limited period shows that Congress felt that public education throughout the program's life was critical.

6 In the legalization programs of other countries, this "distrust of authority" had combined with ignorance to produce low participation rates. H.R. Rep. 73.

(QDEs), whose past activities on behalf of the immigrant community meant that they could be trusted. INS was mandated to contract with, and fund the outreach and counseling activities of churches and social service agencies. QDEs provided preliminary eligibility screening for potentially eligible aliens whose fear of contact with INS would otherwise have discouraged them from filing applications. § 1255a(c)(1)-(3).[7] To further encourage the maximum number of aliens to file applications, Congress barred *all* governmental entities, including INS, from access to any legalization records, including QDE files. § 1255a(c)(3)-(5). A violation was subject to imprisonment up to 5 years or fines up to $10,000. *Id.*[8]

Another major defect in the legalization programs of other countries was their abbreviated application period. See Meissner, Papademetriou, & North, *Legalization of Undocumented Aliens: Lessons From Other Countries*, 1-2 (1986) (Argentina, 6 months, *id.* at 9; Venezuela, 4, *id.* at 11; and Canada, 2, *id.* at 13). So, Congress required a 12-month application period, allowing the most timorous a full year to learn about the requirements for legalization, overcome fear, and then apply. § 1255a(a)(1).

3. Aliens eligible for legalization were those who had "continuously" resided in unlawful status in the U.S. from a date prior to January 1, 1982, through November 6, 1986, the effective date of IRCA. § 1255a(a)(2)(A).[9] From IRCA's

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[7] See *McNary* 892. Eventually, INS contracted with 977 QDEs. 52 Fed. Reg. 44812-24 (1987); Osuna, *Amnesty in the Imm. Reform and Cont. Act of 1986; Policy Rationale and Lessons From Canada*, 3 Am. U. J. of Int. Law & Pol. 145, 176-77, 181-84, 188-91 (1988) (describing the role of QDEs and nature of INS' outreach program).

[8] This was done "to assure applicants that the legalization process is serious and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rpt. 73.

[9] Recognizing that it was natural for some aliens to have left the U.S. for family emergencies, deaths, etc., Congress provided that "brief and casual trips abroad" should not be "considered to break a period of continuous residence" in the U.S. § 1255a(g)(2)(A). This allowed absences up to 45

effective date to the date of application, such aliens would also have to show "continuous physical presence" in the U.S. § 1255a(a)(3)(A).[10]

B. The Lower Court Litigation

1. Common Elements in the Two Cases. These two cases arose as challenges to INS regulations interpreting the statutory requirements of "continuous residence" (*LULAC*), and "continuous physical presence" (*CSS*). See nn. 9-10 *supra* for a discussion of the relevant statutory and regulatory provisions. These regulations extinguished the eligibility of aliens who left the U.S. during the two time periods, and reentered illegally. In both cases, the district courts sustained class action challenges to the offending regulations.[11]

In both cases INS acquiesced in the orders invalidating the offending regulations and granting relief to class members who managed to timely file applications despite INS's rejection policy. These invalidation orders were not issued until just eight days before the end of the one-year application period closed

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days at any one time but no more than 180 aggregate days. 8 C.F.R. 245a(c)(1)(i). It was the *illegal* reentry of undocumented aliens who engaged in this sort of travel that gave rise to the *LULAC* case. INS' regulations, 8 C.F.R. §§ 245a.1(c), 245a.2(b)(9), deemed illegal reentries using INS documents following brief absences to be "constructively" legal, thereby ending the alien's required period of continuous unlawful residence. Of course, since they were undocumented aliens, their reentries could not be other than illegal. *See infra* pp. 14-16.

[10] Similarly recognizing the need for occasional travel out of the U.S., Congress provided that "[a]n alien shall not be considered to have failed to have maintained continuous physical presence ... by virtue of brief, casual, and innocent absences" from the U.S. § 1255a(a)(3))(B). An INS regulation, 8 C.F.R. § 245a.1(g), that illegally required legalizable aliens to obtain prior travel permission from INS, under penalty of loss of the right to apply for legalization, gave rise to the *CSS* case.

[11] The cases were filed, separately, at different times in the eastern and central district courts of California. The Ninth Circuit consolidated them for decision after argument in *CSS*.

(*CSS*), and nine weeks thereafter (*LULAC*). *CSS v. Meese*, 685 F.Supp. 1149, 1160 (E.D. Cal. 1988); JA 54-74; JA 211, 224.[12]

In *CSS*, twofold relief was granted. First, for those few class members who had managed to submit applications prior to May 4, 1988, INS was to readjudicate the applications under the proper standard. PA 24a-25a. INS did not appeal this part of the relief order.

Both district courts issued orders briefly extending the application period for those class members whose applications were rejected over-the-counter because INS and QDE employees adhered to their illegal instructions and regulations, or who failed to file solely because of INS' outreach campaign which unlawfully informed them that their illegal reentries made them automatically ineligible for legalization. See *infra* at 14, 16. These are the only orders from which INS has appealed. While INS concedes that it enforced invalid regulations and policies throughout the application period, it now contends that Congress rendered the judiciary impotent to redress the resultant injury.

2. The CSS Case. To maximize the number of aliens legalized, Congress required "an extensive education and outreach program prior to the application period," H.R. Rep. 73, delaying the start of the application period for six months to allow the outreach and education campaign to achieve its maximum effect. § 1255a(a)(1)(A). Furthermore, Congress recognized that immediately upon IRCA's enactment, legalizable aliens required a stay of deportation to avoid their arrest and expulsion prior to filing applications, and a work permit because the other key part of IRCA, prohibiting employment of all aliens without express INS work authorization, became effective upon

[12] Issuance of the district courts' remedial orders were delayed for a number of reasons, including INS' defense (later abandoned) of the challenged regulations on their merits, an interlocutory appeal taken by the INS in *CSS*, wide ranging discovery INS insisted on taking (including depositions of class members and declarants throughout the country, and several INS motions to dismiss.

enactment of the measure. § 1324a(a); *McNary* 891 n. 2. To insure that no legalizable alien would be expelled, or forced to work for employers willing to violate the new employer sanctions law, Congress required in § 1255a(e)(1) that all apprehended aliens be given a stay of deportation and temporary work permits, even before they could file an application, if they "establish[ed] a *prima facie* case of eligibility" for legalization. *Id.*[13]

Initially, however, INS refused to issue interim stays and work permits to legalizable aliens. Because a large number of illegal expulsions were occurring daily, the *CSS* plaintiffs filed suit six days after the President sigr ed IRCA to compel issuance of instructions to implement § 1255a(e)(1). JA 1. Two hours before the November 14, 1986 TRO hearing, INS finally implemented the stay/work permit provision by sending telexes to all of its offices. JA 184-85. However, this telex contained a rule interpreting § 1255a(a)(3)(B) to mean that no post-November 6, 1986 absence from the U.S. by an undocumented alien could be considered "brief, casual and innocent" unless the otherwise-eligible alien had obtained prior INS permission to travel ("advance parole"). JA 186. This was the very policy that the Administration had unsuccessfully urged upon Congress.[14]

[13] Also, interim stays of deportation and work permits were to be provided to applicants when *prima facie* applications were submitted during the application period. § 1255a(e)(2); *McNary* 892.

[14] While the merits are not at issue in these appeals, it is important when analyzing the jurisdictional and remedial issues to understand that the dispute over the meaning of the statutory term, "brief, casual, and innocent absences" long preceded *CSS*. The history of this dispute reveals that the invalidated regulation was not a simple inadvertent, unintentional, or negligent error. The phrase had evolved as an interpretation of the suspension of deportation authority in § 1254(a)(1), based on *Rosenberg v. Flueti*, 374 U.S. 449 (1963), with both INS and the courts focusing on the purpose of the trip rather than the nature of the reentry. See, *CSS v. Meese*, *supra*, 684 F.Supp. at 1157-59. That interpretation was squarely rejected by this Court in *INS v. Phinpathya*, 464 U.S. 183 (1984), but then just as

From that moment, aliens who had not first consulted with INS and obtained advance parole before briefly departing the U.S., were turned away at both the INS and QDE thresholds, and were denied interim stays of deportation and work permits, because they were deemed "statutorily ineligible."[15] According to INS, such an alien "will *not* be granted employment authorization ... [and] shall be considered to have broken his period of continuous physical presence and thus will be *ineligible for legalization* ..." Legalization Wire No. 1 (11/14/86) (emph. added), JA 185-86. INS instructed its employees that aliens so deemed ineligible for legalization were to be "placed in deportation ... proceedings ..." JA 185.[16] Yet, until May,

squarely reinstated by Congress in IRCA, P.L. 99-603, Stat. 3359, 3439 § 315(b), amending 8 U.S.C. 1254(b).

When IRCA was still aborning in the House Judiciary Committee, the Attorney General vigorously opposed use of the term in both § 1255a(a)(3)(B) and § 1254(b), H.R. Rpt. 116 ("The bill should also specifically state that absences related to violation of the immigration laws would automatically interrupt the physical presence requirement, regardless of the period of absence"): *id.* 124 ("We recommend either deleting this provision or amending it to preclude the establishment of continuous presence...where the alien has engaged in activities contrary to the immigration laws"). What was urged (unsuccessfully) in its stead was authorization to implement the very policy invalidated by *CSS*.

15 CSS quickly amended its complaint to challenge the prior advance-parole travel requirement. On November 24, 1986, the district court issued a nationwide class TRO enjoining the offending regulation. JA 14-16, 23-24. INS appealed to the Ninth Circuit which promptly stayed the TRO. JA 31. On April 3, 1987, the Ninth Circuit reversed, Judge Hall dissenting. JA 27-41, 42-45. The *CSS* plaintiffs sought a rehearing. Because shortly thereafter, the November 14, 1986 telex was amended to move the beginning date of the advance parole requirement from November 6, 1986 to May 1, 1987, 52 Fed. Reg. 16208-09 (May 1, 1987)(8 C.F.R. 245a.1(g)), the Ninth Circuit vacated its prior opinion as moot and remanded the case to the district court. 820 F.2d 289 (9th Cir. 1987).

16 The fate of some illustrative plaintiffs was as follows:

Maria Noriega was apprehended at her Phoenix, Arizona home on November 24, 1987. In August, she had gone to Mexico, without advance parole, for three days to visit her parents. Instead of being allowed to apply

1987, when this policy was modified, the *only* way an alien could know of the policy was by reading the November 14, 1986 telex.[17] Under this unpublished policy, INS immediately

for legalization, she was "told she was not eligible...due to her reentry ...[Therefore,] ... Mrs. Noriega signed a form I-274 requesting a voluntary return to Mexico." JA 179-80.

Sofia Baez de Huerta, after a five-hour trip to Mexico for Mother's Day, testified that "[w]hen I went to see about my amnesty, they told [me] I was not acceptable, and they told me I could not appeal." JA 114.

Trinidad Morales visited an INS office after receiving a phone call from the agency that he should appear to collect a $1,000 bond posted earlier. When he appeared, he was arrested and ousted despite his eligibility for legalization. JA 118-120. He told INS that he "had enough proof" to establish eligibility, but "they were not interested in any such proof." JA 119.

When Doroteo Rodriguez Ibarra reported to INS at an office along the border, because he had an outstanding "voluntary departure" order, rather than being processed for legalization he was told: "Here is the door. Go Back to Mexico." JA 127.

Santiago Colin Feregrino was apprehended in October, 1987, and was told that he was ineligible for amnesty. JA 136. He was handed a "voluntary departure" form and INS "told me to sign ..." They told us if we signed the departure [form], it would not affect our cases ..." *Id.* 137.

Uvaldo Franco Solorio managed to get an application on file despite a forty-five minute departure in 1987. However, at his INS interview he was told that the result of his filing the application would be his "deportation." JA 144-45.

Juan Anselmo Torres-Rivas was deemed ineligible for legalization because of an absence after the enactment of IRCA and therefore, in March, 1987, "was taken to the U.S. Border patrol station in Laredo, Texas, made to sign a form, and *on the same day...INS then made me walk across the bridge into ... Mexico.*" JA 181 (emph. added).

Because there was "a great lack of consistency among different Legalization offices," CRC 133, Pl. Ex. XXX, some class members actually proferred and had accepted timely applications. However, these applications were routinely denied by the INS. See, *e.g.*, CRC 145, Pl. Ex. DDDD, ¶ 13; Exhibit FFFF, ¶ 11. After the application period closed and the district court issued its summary judgment in favor of the *CSS* class, INS agreed to "reprocess" all these denials.

17 5 U.S.C. §§ 552(a)(1)(D) and 553(b)-(c); see *Morton v. Ruiz*, 415 U.S. 199, 233-37(1974); *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir.

began the mass ouster of aliens that Congress had made eligible for legalization.

On May 1, 1987, five days before the commencement of the legalization application period, INS issued its legalization regulations. 52 Fed. Reg. 16205-16. For those who had not been ousted under the earlier policy, the regulation dealing with post-enactment absences, 8 C.F.R. § 245a.1(g), forgave absences between the date of enactment (November 6, 1986) and the effective date of the regulation, May 1, 1987, but continued the INS' requirement that no absence could be "brief, casual and innocent" unless accompanied by "advance parole" for absences on or after May 1, 1987. *Id.* Plaintiffs again amended their complaint to challenge the new regulation on statutory and constitutional grounds. CRC 62.

Following extensive discovery and several INS motions, plaintiffs moved for summary judgment on November 9, 1987. Finally, on April 22, 1988, only eight days before the application period closed, the district court issued a brief, partial summary judgment order invalidating the regulation and declaring that "brief, casual, and innocent" absences did not require prior INS approval.[18] CRC 161. While INS gave no

1977); *Aiken v. Obledo*, 442 F.Supp. 628, 647-55 (E.D. Cal. 1977). It is administrative lawmaking like this that prompted Congress to enact the publication requirements of the Freedom of Information and the Federal Register Acts. 1 Davis, Admin. Law Treatise, §6.09, pp. 392-94, 1st. ed., 1958 (discussing incident in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412-14 (1935) that prompted these Acts).

18 INS' "theory [was that] absent INS permission, the alien's reentry after the absence was unlawful, and thus not 'innocent'." Pet. Bf. 6. In explaining the 20-year evolution in the courts and INS of the contrary theory, the district court explained:

> The logic of the proposition appears clear to this court, given that the question arose in a suspension of deportation context, *all* departures and re-entries were likely to *vel non* violate the immigration laws. Thus if the innocence aspect of the test referred solely to the propriety of departure or re-entry, it would *always* be resolved against the alien; however, as noted, the test was intended to relieve the alien of the application of the immigration law *strictissimi juris*.

685 F.Supp. at 1159 n.10; JA 72 n.10 (emph. added).

INS not only restricted "brief, casual, and innocent absences" to those with INS "advance parole," it further limited advance parole to situations like those with "an emergent need to see an ill [immediate] relative, or a death in the family ..." JA 79.

Moreover, as Raul Aroz, Legalization Director for the largest QDE in the country, explained:

> [r]ather than informing legalization applicants and potential applicants seeking 'advance parole' that the information they provided would be confidential (as part of their legalization application), they were administered "Miranda warnings" and advised that their statements would be used against them in future administrative and/or criminal proceedings. This policy discouraged applicants from seeking advance parole to depart the country. JA 151-52; *cf.* n. 8 *supra*.

19 This minimally inconvenienced INS since the SAW program had a longer application period, extending to November 30, 1986, and applications for both programs were administered by the same staff.

The district court in *CSS* also granted an alternative order -- not before this Court -- applicable only if the order allowing applications to be filed for a limited additional time was reversed; it provides that class members should not be deported and should be provided work authorization. Only now, having *never* raised the issue in the Petition for Certiorari, nor in the Ninth

publicity to the invalidation of the regulation (JA 150), including, apparently, no notice to its own offices or QDEs, even if it had, the remaining time to apply or reapply was far too short for the large number of rejected and discouraged aliens (described more fully *infra* at nn. 23, 25). This ruling was not appealed. On May 3, 1988, the district court filed an extensive opinion explaining the basis of its April 22 order. See 685 F.Supp. 1149; JA 54-74.

Because the offending regulation was not invalidated until just eight days before INS stopped accepting applications, on June 10, 1988, the district court granted the only effective relief at its disposal to remedy the injury to the subclass of rejected and discouraged aliens: it ordered INS to accept applications from these class members until November 30, 1987. PA 22a-28a.[19]

3. The *LULAC* Case. *LULAC* involved another travel regulation, a conceptual variant of that challenged in *CSS*. This regulation interpreted § 1255a(a)(2) (which requires continuous unlawful residence from before January 1, 1982 to November 6, 1986), to establish a non-individualized policy of automatically denying legalization to immigrants who briefly left the U.S. during the required period of continuous unlawful residence, and returned illegally using non-immigrant visas. See 8 C.F.R. §§ 245a.1(c), 245a.2(b)(8), 52 Fed. Reg. 16205, 16208, 16210 (May 1, 1987); JA 211-14. The rationale was that the use of "facially valid" documentation rendered the alien's reentry constructively lawful, and therefore severed the alien's required continuous *unlawful* residence in the U.S., even though the alien, if later apprehended, could never claim lawful entry to avoid swift ouster. JA 217-24.[20] This regulation clearly violated the eligibility criteria as mandated by Congress.[21] It

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Circuit, INS questions the propriety of that remedy. Pet. Bf. 9, 30-31 n. 31.

First, the issue cannot now be raised because it is not embraced by the plain text of the questions raised in, nor in the text of, the Petition for Certiorari. See S.Ct. Rules, Rule 14.1(a); Stern, Grossman and Shapiro, *Sup. Ct. Prac.*, §§ 6.26-27 (6th ed. 1986). Second, because INS failed to raise the issue in the Ninth Circuit, it has waived any right to raise it here. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); Stern, Grossman and Shapiro, *supra*, § 6.26. The Ninth Circuit did not address the appropriateness of this order. In any event, this part of the order is authorized by the traditionally broad remedial powers of a court of equity. See p. 44 *infra*. INS' suggestion that this relief is tantamount to granting legalization, is flatly wrong. INS ignores the key distinction between the sharply different status that class members would possess under the alternative relief order (aliens whose deportation is enjoined), versus their lawful permanent resident status gained through legalization, and eventual eligibility for citizenship. §§ 1255a(b)(1), 1427.

[20] As in *CSS*, *LULAC* class members were also denied temporary stays of deportation and work permits because INS deemed them ineligible for legalization.

[21] Under INS's regulation, *only* those aliens who returned from brief trips clandestinely *evading* INS inspection, were deemed not to have broken their

illegally eliminated tens of thousands of European, Asian, South American and African applicants from eligibility in the legalization program, tilting amnesty to nationals from Mexico and Central America -- those who more traditionally leave and return without inspection.

In July, 1987, LULAC filed suit. JA 5. On November 17, 1987, after defending the challenged regulation and just days before a preliminary injunction hearing, INS modified the regulation to eliminate the disqualifying nature of an illegal entry by means of facially valid INS documentation. See 8 C.F.R. § 245a.2(b)(9)-(10), 52 Fed. Reg. 43843, 43845 (Nov. 17, 1987). However, during the previous seven months, just like *CSS* class members, undocumented aliens who were disqualified by the invalidated regulation had their applications rejected, were denied interim stays/work permits, were ousted upon apprehension, and were informed by INS' outreach program that it was futile to apply.

Because plaintiffs and class members remained injured by the invalidated regulation, *LULAC* moved for summary judgment. On July 15, 1988, the district court ruled that pre-November 17, 1987 reentries into the U.S., after brief absences and returns improperly using INS documentation, did not sever continuous illegal residence. J. A. 211-34. As in *CSS*, INS did not appeal from this merits ruling. Relief in *LULAC* followed essentially the same pattern as that in *CSS*. Because the evidence overwhelmingly established that INS failed to publicize its November 1987 change in policy, and thousands of class members therefore never applied or reapplied before the May 4,

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unlawful residence in the U.S. INS' bizarre regulation ran directly counter to an unbroken line of cases in which the Attorney General, INS, the Board of Immigration Appeals, and the courts had held that an entry accomplished with a visa or other INS documentation is unlawful when the alien had made material misrepresentations in the visa application or at the time of his/her request for admission to the country. See, *e.g.*, *Brownell v. Carija*, 254 F.2d 78, 80 (D.C. Cir. 1957); *Matter of I.L.*, 7 I&N Dec. 233 (BIA 1956); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (Atty. Gen. 1964).

1988, deadline, the district court, on August 12, 1988, extended the application period for class members for a period less than four months, to November 30, 1988. App. 50a-60a.[22]

C. The Rejection of Applications and the Erroneous Outreach and Education Campaign by INS and QDEs Necessitated the Orders Granting Brief Extensions

The remedial problem that faced the district courts in both cases was caused by three interrelated factors: (1) INS and its QDEs refused to accept applications submitted by class members; (2) INS and its QDEs distributed erroneous information in the statutorily mandated educational outreach effort, thereby having the intended effect of deterring class members from trying to file applications; and (3) the judiciary's inability to resolve these cases in sufficient time before the twelve-month application period ended to provide class members a reasonable opportunity to file applications.

1. Many class members are aliens who were thwarted from even filing applications based on one or both of the two invalidated regulations. Indeed, this was compelled by INS' own required procedures. For example, reflecting the policy in the earlier telex (JA 185-86; see *supra* p. 11), the INS Legalization Manual, binding on both INS staff and its QDE agents, expressly stated that "[i]f there are major deficiencies in the application package *or if the applicant. ... is statutorily ineligible, the application will be rejected,*" JA 188 (emph. added), which meant that it was returned without processing. *Id.* This practice of rejecting applications is informally called "front desking," since it occurs at the front desk of an INS office. To get an application filed a "front desked" applicant

22 The district court concluded that by applying its invalid regulation from May until November 1987, the INS had "effectively designated a six-month [rather than a twelve-month] period for application" by those in the class. JA 56a.

would have to convince an INS or QDE clerk to ignore INS' regulation and written rejection policy.[23]

Moreover, the Cooperative Agreement between each QDE and INS required QDEs to comply with "all INS regulations relating to the legalization program." JA 150. As a result, logic as well as the record evidence in these cases, demonstrates that many eligible aliens were told by QDEs acting as INS' agents,[24] that they would not be permitted to file applications because they did not satisfy one or the other of the regulations invalidated in these cases. As Raul Aroz, the Legalization Director for Catholic Charities of Los Angeles, the largest QDE in the U.S. (having screened over 300,000 potential applicants) explained, until the *CSS* court's April 22, 1988 prohibition on enforcement of the advance parole regulation:

> QDEs, including Catholic Charities, recommended to many applicants that they not file legalization applications

23 The evidence overwhelmingly confirmed implementation of INS' written policy of rejecting applications proferred by class members. INS conceded in discovery that prior to October 8, 1987 it was its policy to reject applications proferred by *LULAC* class members. CRL 16, Ex. K at 144. In San Francisco, it was "the practice of [INS] to deny [*LULAC* class members] the right to file an application for legalization ..." JA at 200-01; see also CRL 16, Ex. P at 159. It was the same in other California cities: CRL 16, Ex. K at 144 (Oakland); CRL 16, Ex. L (San Diego); CRL 16, Ex. F (San Jose); JA at 204 (Chula Vista); and in Arizona, JA at 209. See also CRL 16, Ex. H at 135; CRL 59, Ex. GG at 2-3; CRL 16, Exs. C-Z; and CRL 16, Ex. O.

INS's suggestion that the challenges to the regulations are not yet ripe because they had not yet been applied, see discussion of *Lujan v. National Wildlife Fed.*, 110 S.Ct. 3177 (1990), Pet. Bf. 20, is surely answerable by INS' rejection of valid applications. It is the crucial denial of a temporary work permit and stay of deportation upon apprehension, or via "front desking" (the fate of each of those in the preceding paragraph), and the consequent loss of a lawful right to work and vulnerability to deportation that is the "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 3190.

24 In *Ayuda v. Thornburgh*, 880 F.2d 1325, 1339 (D.C. Cir. 1989), INS conceded that QDEs are its agents.

because they were deemed statutorily ineligible by the INS ... Many *CSS v. Meese* class members, numbering in the hundreds or thousands, remain in the country but failed to file their legalization applications because they were advised by the INS, or a QDE under contract with the INS, that they did not qualify as a result of reentries after INS' various last-date-of-entry rules, and they did not want to waste the filing fees and costs associated with filing....To the best of my knowledge, the INS [had] not yet even notified the Local Legalization offices of the court's ruling, and the vast majority of QDEs, non-profits and class members remain unaware of the court order.

Many of the class members have departed the [U.S.] because they were led to believe that they were ineligible for legalization by the INS. Others were apprehended by the INS while attempting to return to the [U. S.] other than on advance parole and thereafter, while still in INS custody, signed "voluntary departure" forms ... because they were led to believe they had no right to remain in the U.S ...

JA 149-50; see also, JA 197-98 (declaration of Hon. G. Indelicato, Director of Catholic Charities of Los Angeles, and former INS Immigration Judge, to the same effect).

2. Second, the "extensive education and outreach program," designed to counteract the "lack of understanding among the undocumented population," and thereby "*encourage* participation," H. R. Rep. 73 (emph. added), produced just the opposite result.[25] While INS widely publicized its illegal

[25] INS announced on Spanish language TV that those who entered with nonimmigrant visas after 1982--i.e. *LULAC* class members--were "disqualif[ied]" from participation in the program. CRL 16, Ex. C at 110. In Hawaii, INS advised community agencies that class members should be "discouraged from filing legalization applications." CRL 16, Ex. R at 168. At "liaison" meetings held between INS and community representatives of legalization applicants, the INS "reiterated" its "reentry" regulation, "namely that aliens, who otherwise qualified for legalization, were deemed ineligible ... if they briefly departed the [U. S.] after January 1, 1982, and thereafter returned using non-immigrant visas." CRL 16, Ex. CC at 211. The QDEs in turn "advised potential applicants of INS's position in this regard." *Id.* JA 147 (Yanez did not file because he read several articles in which "INS officials were quoted as saying that people who left after May 1, 1987, were ineligible for amnesty." This was confirmed when he visited the offices of Catholic Charities, a QDE in Los Angeles); CRC 167, Ex. UUUU, ¶ 5 (same). See also CRC 167, Ex. TTTT (heard of ineligibility through INS media quotes, confirmed by a QDE); CRC 120, Ex. OOO, ¶ 10 (advised of ineligibility by QDE); CRC 120, Ex. PPP, ¶ 17 (same); CRC 115, Ex. YY, ¶ 12 (same); CRC 148, Ex. LLLL, ¶ 6 (same).

regulation, it was relatively silent on its November 1987 modification of the invalid regulation. Hon. G. Indelicato, a former INS Immigration Judge, and Director of the largest QDE in the U.S., said:

> [T]housands, if not tens of thousands, of potential applicants for legalization who qualify for the benefit do not know that INS has now changed its policy regarding reentries affected with non-immigrant visas during the required period of unlawful status ...To my knowledge, the INS has taken no steps to publicize this change in policy ...

JA 198.[26] INS conceded that at least 100,000 eligible aliens were effected by its decision to rescind the regulation challenged in *LULAC*. CRL 29 at 70 and 72. On December 3, 1987, pursuant to court order, INS filed an unsworn pleading describing in conclusory and vague terms its publicity regarding the change in policy. CRL 26. However, sworn responses to

[26] See also, testimony of experienced immigration attorneys: "I have seen no attempts by [INS] in the San Francisco Bay Area to inform the public of the change in policy ... so that they would know that they are now eligible to apply." JA 201; JA 205, 208, 210 (same). The same experience was suffered by the members of other deterred classes. See, *e.g.*, *Perales v. Thornburgh*, *supra*, 967 F.2d at 810.

plaintiffs' discovery requests disclosed that the change in policy was hardly publicized at all. CRL 29, Ex. K at 49-51, 55-60.[27]

3. Finally, even though the plaintiffs in these cases moved extraordinarily swiftly, the courts obviously could not reach final judgment in time to permit class members a reasonable opportunity to file their applications. Even though INS did not appeal the merits, these cases have taken several years to reach this Court and final judgment is still likely several months away. See *supra*, n.12.[28]

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[27] For example, INS was unable to produce a single Spanish or Asian newspaper article on the policy change. *Id.* In fact, unless class members could read (and afford) one of eight English newspapers, in just certain regions of the U.S.--the Wall Street Journal, New York Times, Washington Post, Los Angeles Times, Baltimore Sun, Washington Times, Miami Herald or Chicago Tribune--they may never have learned of the agency's change in policy. *Id.* 70-81. Community advocates and attorneys involved in the legalization program uniformly reported that no local publicity about the change in policy was generated by the INS. See *e.g.*, CRL 16 at 116, 119, 123, 138, 141, 144, 147, 159, 176, 178. INS TV and radio announcements, prepared after the change, were silent about the change in policy. CRL 29 at 104-07. However, according to an INS-sponsored survey, 49% of "potentially eligible undocumented aliens" did not apply for legalization because they "believe[d] themselves not to be eligible for the program." Cong. Rec. S5040 (daily ed., April 28, 1988).

[28] Pending appellate review, class members clearly required protection from deportation and forced unemployment. In *LULAC*, it was provided by stipulation, CRL 76, while in *CSS*, by a Ninth Circuit order. PA 97a. Approximately 300,000 putative class members have surrendered to the INS (protected by confidentiality provisions) and filed provisional applications under stipulated stay orders which still remain in effect. All have been given INS receipts for their applications, and 100,000 have been issued temporary stays of deportation and employment authorization. Reversal by this Court will return these class members to the unregulated "shadow underground." Under the present stay orders, their applications are confidential so deportation proceedings will not begin unless they are independently apprehended. Reverting hundreds of thousands of legalization-eligible aliens to undocumented status will completely thwart the dual Congressional objectives intended by enactment of amnesty and employer sanctions. See also Brief of Amicus Curiae of the Cities of Chicago, New York, Los Angeles and the District of Columbia filed in this case.

SUMMARY OF ARGUMENT

1. *McNary v. Haitian Ref. Cent., Inc.*, 111 S.Ct. 888 (1991) held that IRCA's specialized judicial review provision applied "*only* to review of denials of individuals ... applications," *id.*, 897 (emph. added), because it "seems plain ... that [so] restricting judicial review ... is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899. Precisely the same type of claims are in these two cases. Restriction to § 1255a(f) review, would have deprived class members of work authorization and stays of deportation, both crucial to survival in the U.S., *pending* resolution of their "generic" challenges, which would take years. Therefore, such review, "as a practical matter ... [is not] meaningful judicial review." *Id.* 989. Therefore, INS' substantive/procedures-practices distinction does not alter *McNary's* conclusions; moreover, the claims in these cases raise challenges to substantive regulations, as well as agency procedures and practices.

2. The facts of these cases amply undergird application of this Court's recent decision in *Irwin v. Veteran's Admin.*, 111 S.Ct. 453 (1991), supporting the presumption that Congress intended judicial power to equitably toll the application period, a result manifestly furthering IRCA's overall purposes. It has not been shown that Congress intended otherwise, nor can the earlier decision in *INS v. Pangilinan*, 486 U.S. 875 (1988), be read to rebut the presumption.

ARGUMENT

Both of the questions before the Court essentially require the discernment of Congressional intent. As to the first question, jurisdiction, that task was undertaken last year in *McNary*. With respect to the issue of remedy, the task is made easier by Congress' express direction that any doubts should be resolved in favor of an interpretation that maximizes the number of

eligible aliens whose status is thereby regularized -- Congress insisted that the Act "be implemented in a liberal and generous fashion" because "[s]uch implementation is necessary to ensure the true resolution of the problem and to ensure that the program will be a one-time only program." H. Rep. 72.[29] Yet, in the face of this Congressional directive, INS suggests a remarkable, dualistic interpretive paradox. First, IRCA *must* be interpreted to *prevent* the courts from granting effective relief from the implementation of INS' illegal regulations and widespread rejection of applications and dissemination of erroneous advice, with the immediate effect of excluding hundreds of thousands of aliens who were likely to be legalized, ultimately returning them to the "shadows," forcing them to turn to crime or find employers willing to violate the employer sanctions law in order to survive, and encouraging all of the social ills associated with a large undocumented population. This, INS, asserts will faithfully effectuate the will of Congress. *Cf.*, U.S. Constitution, Art. II, § 3. The second prong of this paradox is this: in INS' view the *only* judicial review available to the class members is through §1255a(f), which however is *not* available because class members did not receive "denials," since they did not file applications within the designated one-year period.[30]

Even though the nature and extent of how INS injured the classes did not completely become known until just before (*CSS*) or after (*LULAC*) the application period closed, INS' response is, "Well, that's your fault -- you should have applied

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29 The Legalization Appeals Unit has cited this directive in decisions designated as precedential by the Commissioner of INS. See, *e.g.*, *Matter of C-*, 19 I&N Dec. 808, 810 (Comm'r 1988); *Matter of N-*, 19 I&N Dec. 760, 762 (Comm'r 1988). See also n. 4 *supra*.

30 As we discuss below, class members would never have been able to appeal "denial[s]" of their applications as they never received "denial[s]" because their applications were rejected. Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the time of the determination on the application ..." But because class members never received such a "determination" there is no "administrative record."

even though we would not accept your applications and we widely publicized your ineligibility." Surely, that is not the lesson in America's form of democratic governance that Congress wished to plant in the world community in this, the quincentenary of Columbus' voyage.

When Congress drafted IRCA, it is fair to conclude that it was assumed INS would promulgate regulations consistent with the statute. Here, INS admits that it violated the statute (by its failure to appeal the merits of these two cases), preventing hundreds of thousands of otherwise eligible aliens from seeking legalization, despite Congress's clear intention that they be legalized. This Court now faces the same question that was before it in *McNary*: what access to judicial review did Congress intend these injured aliens to have, with the added question of what remedies can courts craft to fulfill congressional intent: class-wide resolution at an early stage that permits temporary work authorization and stays of deportation, or return to the underground and futile administrative exhaustion and hundreds of thousands of individual cases clogging the administrative system and the courts of appeals for years?

I. JURISDICTION

A. *McNary v. Haitian Refugee Center*

INS' jurisdictional argument requires no more than a straightforward application of the decision in *McNary*, which broadly held (1) that Congress did not intend to divest the district courts of their traditional 28 U.S.C. § 1331 jurisdiction to hear *all* statutory and constitutional challenges to INS' policies and regulations (both statutory and constitutional claims are made in the two cases now before the Court),[31] and (2) that Congress intended IRCA's specialized review procedure to

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31 8 U.S.C. § 1329 provides a further basis for jurisdiction over "all causes ... arising under any of the provisions of" the subchapter of the INA in which IRCA is located.

apply *only* to individual challenges to those policies applied on a case-by-case basis. *McNary* stated:

> [W]e hold that [IRCA's specialized review provision] applies *only* to review of denials of individual ... applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal question jurisdiction under 28 U.S.C. §1331 to hear this action remains unimpaired ...

Id. at 897 (emph. added).[32]

McNary began by analyzing the plain language of § 1160(e)(1)-(3), the SAW version of § 1255a(f)(1), (3) and (4), which created a specialized judicial review procedure applicable, by its terms, only to claims challenging "a determination respecting an application for adjustment of status." *Id.* 896.[33] Adopting the lower courts' construction of this language. *McNary* stated:

> The critical words in [§1160(e)], however, describe the provision as referring *only* to review "of *a determination* respecting *an application*" ... Significantly, the reference to "a determination" describes a single act, rather than a group of decisions or a practice or procedure employed in making decisions.

Id. (emph. added). See also *Morales v. Yeutter*, 952 F.2d 954, 956-57 (7th Cir. 1991) (Posner, J.) ("[I]t is apparent from the language of the provision and ... the character of immigration

[32] *McNary* concluded that Congress did not intend to bar application of this Court's broader doctrine, rooted in the practical need for economizing scarce judicial resources, that distinguishes between broad constitutional or statutory challenges to an agency's policies, and narrow challenges to an agency's application to the facts of an individual case. See, *e.g.*, *UAW v. Brock*, 477 U.S. 274, 291 (1986); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986).

[33] When *McNary* was before this Court, contrary to its current position, INS urged this Court to interpret the two jurisdictional provisions *identically*. *McNary*, Govt. Pet. for Cert. 28; see also *Ayuda v. Thornburgh*, No. 89-1018, Govt. Opp. to Cert. 16.

proceedings, and ... [*McNary*] held ... that the provision is limited to cases brought by [an alien] whose application ... is turned down").

In short, Congress intended that § 1160(e) review applies *only* to fact-finding or law-applying challenges to the "merits of a denial of a particular application," *id.* 897, "rather than ... general collateral challenges to unconstitutional practices and polices used by the agency in processing applications," *id.* 896, or "generic constitutional and statutory claims." *Id.* 899. At *no* point did the Court draw the distinction drawn by INS between a collateral challenge to INS' procedures, rather than the substantive standards under which INS evaluated applications. See Pet. Bf. 22-24.[34]

Moreover, the *CSS* and *LULAC* class members now before this Court did not seek a determination on any alien's discrete legalization application; none had received an INS "denial," which indeed is the essence of the problem in these cases. Rather, they challenged, on constitutional and statutory grounds, the two pertinent eligibility regulations that INS had instructed all of its staff, QDEs, and the Legalization Appeals Unit ("LAU") to follow in "rejecting" individual applications and erroneously advising individuals of their ineligibility.

Significantly, even in the situations where an alien who fell within either of the classes somehow filed an application, there could be no way to review the conformity of the regulations to the statutes. Congress could not have intended the exhaustion of futile administrative remedies. The LAU has no power to invalidate INS regulations on statutory or constitutional grounds. See *infra* at n. 41. Exhaustion of an administrative

[34] Putting aside the absence of a common sense, pragmatic need to revisit *McNary* while its ink is still drying (see *Hilton v. South Caro. Pub. Rys. Comm.*, 112 S.Ct. 560, 563-64 (1991); *Quill Corp. v. North Dakota*, 112 S.Ct. 1906, 1916 (1992)), INS' discovery of a "heart of the case" test lurking in the penumbras of *McNary* is unsupported in either the opinion's logic or its text, the text or legislative history of the statute, or even the analysis of the two *McNary* dissenters.

appeal in such a case therefore is clearly futile.[35] It must be emphasized that an alien challenging the legality of a particular regulation in that process could do so, with finality, only by challenging a deportation order issued years *after* rescission of employment authorization, a very daunting prospect that exacts a "price [that] is tantamount to a complete denial of judicial review ..." *McNary, supra,* at 898.

B. The *Ayuda II* Decision

INS asserts the reading of *McNary* adopted by *Ayuda v. Thornburgh,* 984 F.2d 742, 747-59 (D.C. Cir. 1991), *reh'g den.*, 958 F.2d 1089 (1992) (*en banc*) (*Ayuda II*). The *Ayuda II* majority ignored both the plain text of § 1255a(f) and this Court's common sense construction in *McNary*, and made no attempt to explain how the phrase "a determination respecting an application" by its terms supported a distinction between collateral and direct legal challenges. Instead, the majority simply concluded that this Court did not mean what it had plainly said in *McNary*. See *Ayuda II,* at 748-49 & n.5.

McNary concluded that INS could find no solace in the text of § 1160(e)(3)(B) (paralleling § 1255a(f)(3)(B)), limiting court of appeals' review "solely [to] the administrative record," and stating that "findings ... shall be conclusive [subject to] abuse of discretion," or when directly contradicted by "clear and convincing facts," because generic statutory and constitutional challenges do not fit within that model of review. Therefore, such challenges were not within Congress' contemplation of the scope of IRCA's narrow judicial review provision. *Id.* 896.

Ayuda II appears to ignore this conclusion. While conceding the premise, the *Ayuda II* majority claimed that Congress must have intended the § 1255a(f) "abuse of discretion" standard to be implicitly transformed into a "*de novo*

35 Moreover, the rejection of an application, as mandated by INS's Legalization manual (p. 17, *supra*), is not administratively reviewable. *Matter of Hernandez-Puente*, Interim Dec. 3153 (BIA 1991) ("[w]e have no jurisdiction ... to review or remedy a failure to act on [an] application").

standard" -- despite total textual silence -- whenever a plaintiff brought a legal rather than a factual claim. 948 F.2d at 748. But *McNary* expressly held otherwise, concluding that if Congress had intended § 1255a(f) to apply to legal challenges, it would have explicitly adopted a *de novo* standard of review. *McNary* 897. See also *Perales v. Thornburgh, supra*, 967 F.2d at 806-08.

C. Section 1255a(f)(2) Does Not Deprive the District Courts of Jurisdiction

Only one aspect of this case distinguishes it from *McNary*, but it is a distinction without a difference: the SAW judicial review provisions in § 1160(e) have no counterpart to § 1255a(f)(2) which precludes judicial review of the "denial of adjustment of status ... based on a late filing of an application..."

First, no class member received a "denial" and, as *McNary* held, the reference to "an application" relates only to "denials" of individual, completed applications, not to challenges to practices that thwarted the filing of applications. *Id.* 896; *Perales* at 807. Second, Congress' purpose in enacting this provision was to derail "efforts that will be made, on behalf of many persons *who are ineligible for the legalization program*, to delay the final determinations of their applications." S. Rpt. 48 (emph. added). The cases before the Court present precisely the *opposite* situation -- the aliens seeking relief are those likely to be *eligible*. As *Perales* emphasized, "[t]his action presents the question of whether *defendants* have circumvented a clear congressional purpose to provide a 12-month application to qualified applicants, not whether plaintiffs have done so." 967 F.2d at 807 (emph. in orig.). Finally, absolutely nothing in the text or the legislative history gives the slightest hint that "Congress intended, in § 1255a(f)(2), to insulate from judicial review INS regulations [or practices and policies, like rejection of applications] which ... have the effect of shortening or eliminating altogether the statutory application period." *Id.*

D. The Opportunity for Meaningful Judicial Review Under § 1255a(f)(2) Is Absent Under the Facts of These Cases

INS claims that here, in contrast to *McNary*, there is an opportunity for meaningful judicial review thus overcoming the traditional presumption favoring district court jurisdiction. Pet. Bf. 24-28. The argument is that a challenge to a regulation does not suffer by limitation to the administrative record, an assertion that ignores *McNary's* key conclusion that limiting judicial review of legalization denials to cases where aliens had to "voluntarily surrender themselves for deportation [is]...[q]uite obviously ... tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* 898.[36]

McNary held that limiting generic constitutional and statutory challenges to § 1255a(f) review would create enormous practical hurdles. Nothing in INS' argument offers any reason to abandon that conclusion. To do so now requires concluding that Congress intended individual legalization claimants, as a condition to obtaining judicial review of a statutory or

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36 INS concludes this argument with the suggestion that deportation proceedings would naturally follow denial of an application. Pet. Bf. 13-14 ("In short, [respondents] could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that *would have been brought against them* if they had been denied relief [by the LAU]" [emph. added]).

But there is no inexorable link between denial of legalization and deportation. Indeed, those who have resided in the "shadows" for 5, 10, 15, 20 years, have obviously shown keen evasion skills. Moreover, Congress created a Chinese Wall between INS legalization and enforcement staff, threatening the latter with severe criminal sanctions if they used information collected in the legalization process. §1255a(c)(5).

Finally, it appears that INS would not accept a surrender from an alien in this predicament. INS in *CSS* argued that an alien cannot surrender to the agency and thereby accomplish his or her apprehension. See CRC 40, at 42.

constitutional challenge to an INS legalization regulation or national practice:

1. To convince an INS or QDE clerk to ignore INS' rejection policy;

2. To make a necessarily futile (and costly) application for legalization;[37]

3. To appeal the resulting denial to a LAU that has no authority to consider the merits (and thus rule in the alien's favor) on a statutory or constitutional claim;[38]

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37 The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. §103.7(b).

38 *McNary* 896-97 ("Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of those claims to the procedures set forth in [the specialized review provision] is not contemplated by the language of that provision"). Yet, inexplicably, INS persists in claiming that allowing district court class action challenges to regulations bypasses adjudication by the expert administrative agency. Pet. Bf. 21.

This argument is actually *stronger* here than in *McNary*, since the administrative process in *McNary* could have resulted in some individuals being granted legalization despite the procedural barriers that the INS imposed. As INS acknowledged in *McNary*, where the alien's challenge is to the INS' legalization *procedures* (rather than to a substantive eligibility guideline), the LAU might *still* grant legalization, notwithstanding the alleged violations. See Pet. Bf. in *McNary* at 18 n.14 (the LAU "could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention....Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue"). In the present cases, by contrast, *any* administrative review would be necessarily futile and unilluminating. But, the LAU has no authority to reject a regulatory interpretation of a statute. *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989)("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations...any more than there is authority to consider constitutional challenges to the laws we administer.") See also, 8 C.F.R. §103.3(a)(3)(iii).

4. To waive the statutory right to confidentiality by convincing INS to accept a voluntarily surrender,[39] or wait however long to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate -- thus precluding judicial review altogether);[40]

5. To be issued an order of deportation by an Immigration Judge and then file a futile appeal to INS' Board of Immigration Appeals;[41]

6. To file a petition for review in a court of appeals that has not had the benefit of prior district court consideration of these statutory or constitutional issues;[42] and

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39 §§ 1252, 1255a(c)(4), (5); n. 36, *supra* (INS would not necessarily accept voluntary surrender); see also S. Rep. 47 (QDE confidentiality provision encourages aliens to come forward "without fearing that their applications would be forwarded to the INS...."); H.R. Rep. 73.

40 See *McNary* 898 (aliens cannot obtain any review unless they "voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens"); *Matter of Merced*, 14 I & N Dec. 644 (BIA 1974), *aff'd mem.* 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

41 The Immigration Judges and Board of Immigration Appeals have: (1) no authority to review a denial of a legalization application, § 1255a(f)(3), 8 C.F.R. §§ 3.1(b), 103.1(f)(2)(xxvii), 103.3(a)(2)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings"); (2) no authority to consider a late application, § 1255a(f)(2); (3) no authority to consider an equitable tolling claim involving INS' rejection of an application, *Matter of Hernandez-Puente*, *supra*, at 27; and (4) no authority to consider statutory and constitutional challenges to the Attorney General's regulations. See n. 38, *supra*.

42 See *McNary* 898-99 (under the government's approach, the courts of appeal "would also lack the fact-finding and record-developing capabilities of a federal district court. . . . [S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court fact-finding would unnecessarily duplicate an adequate administrative record -- circumstances that are not present in "pattern and practice" cases where district court fact-finding is essential'").

7. To be deprived for years of "employment authorization," and thus suffer the severe hardship of having no legal right to work in this country, throughout this entire lengthy period.[43]

McNary concluded that "[i]t seems plain to us ... that restricting generic challenges is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899; see also, Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?* 25 Harv. C.R.C.L.L.Rev. 53 (1990). The key question then is not whether the challenges are "direct" or "collateral," but whether, as *McNary* directs, they assert a generic constitutional or statutory claim, as indeed they do.

Finally, even accepting INS' direct/collateral distinction, the present cases fall on the "collateral" side of the line. In neither of these cases did plaintiffs request, nor receive, legalization. Rather, the relief sought and obtained only assured statutorily correct consideration of their applications *by INS*. As this Court stated in a similar context in *UAW v. Brock*, *supra*, 477 U.S. at 477, that a grant, or denial, of legalization might eventually result from these cases is irrelevant.

In short, it is hard to believe that Congress intended mandatory administrative exhaustion of claims whose resolution

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43 See *McNary* 892 ("the mere filing of a 'non-frivolous application' entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed"; *id.* 895: "the denial of [legalized] status places the alien in an even worse position than he or she was in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons"; see also § 1255a(e)(2)(B) (providing employment authorization to any alien who could establish a "prima facie" case of legalization eligibility); § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a non-frivolous case of eligibility to have his status adjusted ... (but for the fact that he may not apply for such adjustment until the beginning of such period) ...").

would not be furthered thereby. See n. 41, *supra*. And, INS' analysis completely ignores the substantial burden on immigration judges and the courts of appeal if each of the hundreds of thousands of class members in these cases were ordered deported and then raised these issues in individual appeals under § 1105a. *McNary* 898-99.[44]

E. The Congressional Incorporation of 8 U.S.C. § 1105a into § 1255a(f) Shows That District Court Review of Systemic Practices and Regulations Is Appropriate

By its terms, § 1255a(f)(4)(A) incorporates § 1105a, which governs direct appellate review of INS deportation orders, into IRCA's specialized review provision. Section 1105a has been

44 Had Congress intended § 1255a(f)(1) to be more broadly inclusive, statutory language to express such an intent was readily at hand. For example, *McNary* emphasized that Congress could have modeled § 1255a(f) on the more expansive language of § 1329 -- the general grant of district court jurisdiction under Title II of the INA --by channeling into specialized review "all causes...arising under any of the provisions of [the legalization program]." *Id.* 897. Similarly, Congress could have modeled § 1255a(f) on 38 U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these broader options -- thus its choice of the narrower language was surely intentional.

Indeed, the Senate's broad proposed language was expressly *rejected* in Conference (see S.Rep. 48) in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision" or determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" or to the provision in that section of the Senate bill for Attorney General rule making. Indeed, in the final version of IRCA, the Attorney General's legalization program rule making authority (§1255a(g)) is not even mentioned until *after* the specialized review provision (§1255a(f)), thus further indicating that rule making was *not* subject to that review provision.

consistently interpreted, by this Court and others, to permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order.[45]

This construction of § 1105a must be deemed to have been incorporated into IRCA, *Lindahl v. Office of Per. Mgmt.*, 470 U.S. 768, 782 n.15 (1985), which shows Congress did *not* intend generic challenges to policies and regulations, which exist separate and apart from any specific individual adjudication, to be cabined by § 1255a(f). The machinery of § 1105a (and its uniform body of case law) informs the meaning of "a determination respecting an application" in §1255a(f)(3).

For the *LULAC* class members there would never have been judicial review had the district court not assumed jurisdiction. None of the *LULAC* plaintiffs and class members protected from deportation and permitted to work by the court's order would ever have been able to appeal "denial[s]" of their applications through the procedures set forth in § 1255a(f), they never received "denial[s]." The illegal regulation, coupled with its "rejection" policy and erroneous education program, meant

45 See, *e.g., El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir. 1991); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531, 535-39 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, 913 F.2d 1350, 1352 (9th Cir. 1990), *rev. on other grounds*, 112 S.Ct. 551 (1991); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D. Cal. 1982); *Hotel & Restaurant Employees Union v. Smith*, 563 F.Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F.Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); see also *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968) ("In situations to which the provisions of §106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court").

that thousands of class members never even got applications on file. Judicial review of denials are reviewed on "the administrative record established at the time of the determination on the application ..." § 1255a(f)(3)(B). But here, class members *never* were allowed to receive a "determination on the[ir] application[s] ..." So, there is no "administrative record" to review. Accord *Perales*, 807.

District court jurisdiction also provided class members with protection from illegal arrest and deportation. As mentioned above, because INS *deemed them ineligible* for amnesty, it therefore considered class members equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. 8 U.S.C. §§ 1255a(e)(1), 1255a(e)(2).

II. THE DISTRICT COURTS HAVE THE AUTHORITY, AND THE DUTY, TO CRAFT A REMEDY IN ORDER TO FULFILL THE INTENT OF CONGRESS

This Court recently said that in the federal courts:

> equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1986) (citations omitted).[46] This principle should not be abandoned.[47]

[46] See also *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986) ("Congress intends the executive to obey its statutory commands and...expects the courts to grant relief when an executive agency violates such a command"); *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth

A. This Court's Equitable Tolling Doctrine Supports the District Courts' Remedial Orders

Affirmance of the district courts' remedial orders requires only a rather simple application of the principles of the line of cases culminating in *Bowen v. City of New York*, 476 U.S. 467 (1986), and *Irwin v. Veterans Admin.*, 111 S.Ct. 453 (1991).

Irwin was a Title VII case which had been filed beyond the 30-day filing period. The lower courts rejected the claim, reasoning that the period was jurisdictional, comparable in effect to INS' contention here. The Chief Justice's opinion frankly notes that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts." *Id.* 456. The Court went on to emphasize that:

> to decide each case on an *ad hoc* basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us the opportunity to*

and flexibility are inherent in equitable remedies"). Finally, the APA, 5 U.S.C. §706(1), requires a court to "compel agency action unlawfully withheld or unreasonably delayed." See *Lyng v. Payne*, 476 U.S. 935, 937-38 (1986).

[47] Constructive filing is another basis for remedying the harm caused by INS, and there are at least two bases to conclude that class members constructively filed applications prior to May 4, 1988. See *In re Thornburgh*, 869 F.2d 1503, 1516 (D.C. Cir. 1989). First, a large number of the class members actually tried to file applications with INS or its QDE agents. The remainder of the class, those who were effectively discouraged by INS's greatest "success" in its outreach and education campaign, should be protected by the well-settled rule that the certification of a federal class action brings the *entire* class before the court. *American Pipe & Const. v. Utah*, 414 U.S. 538, 550-52 (1974). Their complaints in these cases should be considered a constructive filing because the actions of INS thwarted them from filing administratively.

adopt a more general rule to govern the applicability of equitable tolling in suits against the government.

Id. 457 (emph. added).

Irwin adopted a rebuttable presumption in favor of the availability of equitable tolling, like that applicable in "suits between private litigants [which are] customarily subject to 'equitable tolling ...'" *Id.* 457 (citation omitted). An examination of Congressional intent serves as the source of rebuttal, if any.[48]

The strength of the presumption is illustrated by the comparison in *Irwin*, at 457, between the Title VII language at issue there (" 'within thirty days...an employee...may file a civil action'"), contrasted with the operative language in *Soriano v. United States*, 352 U.S. 270 (1957) ("'every claim...shall be barred unless the petition ... is filed ... within six years'"), the case that *Irwin* essentially overruled. After comparing the two statutes, *Irwin* said: "An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.* at 457. A fair comparison of § 1255a(f)(2), with that analyzed in both *Irwin* and *Soriano*, reveals that it is no more stringent than either one. Indeed, the language of the statute in *Soriano* seems far more stringent.[49]

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48 This Court has long held that "equitable [tolling] is read into every federal statute of limitation" regarding private defendants. See, *e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). While the Government contended that so extending the presumption raises sovereign immunity concerns, *Irwin* said that where there is a waiver, such as in the APA application of the private-suit tolling presumption to government suits "amounts to little, if any, broadening of the ... waiver." 111 S. Ct. at 457.

49 Affirming the correctness of the presumption in *Irwin*, Senator Grassley, a leading opponent of a 1988 bill introduced to extend the amnesty application period, said: "the proponents [of an across-the-board extension] argue that certain court decisions recently handed down make some 75,000 persons eligible for the legalization program. *There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well-equipped to evaluate [such] equitable considerations.* The Senate need not enact a broad extension to accomodate certain litigants." Cong. Rec. S5041 (April 28, 1988) (emph. added). Immediately after Senator Grassley spoke, Senator Alan Simpson, the primary author and floor manager of IRCA, spoke. He expressed *no* disagreement with Senator Grassley's comments, and expressed his view that eligible aliens had a full "nine innings" to apply, "the ballgame has not been shortened." *Id.* S5040. The class members before this Court did not have a "nine inning" ballgame. They were generally not even admitted to the ballpark.

50 See also *Bowen v. City of N.Y.*, 476 U.S. 467, 479-80 (1986) (same); *Gaus v. Brooklyn East. Dist. Term.*, 359 U.S. 231, 234-35 (1959) (same); *Zipes v. Trans World Airlines*, 445 U.S. 385, 393 (1982) (tolling not limited to "statutes of limitations"). See further discussion *infra* at 59.

51 INS itself has recognized this in several other situations in which the agency has, for equitable reasons, extended the formal application period. The INS extended the application period for those "who applied unsuccessfully for registry prior to May 4, 1988 ... The date of application for legalization will be the date that the applicant applied for registry ..."; "registry" is an entirely different statutory benefit. CRL 65, Ex. 1. INS also deems applications timely filed if submitted to a QDE, even though the QDE failed to timely file the application with the INS. *Legal Opinion: § 245A Legalization Applications Filed Timely with QDE But Late Filed with INS* (Feb. 2, 1989), published in 67 Int. Releases 44-45 (Jan. 8, 1989). Finally, the agency has extended the deadline for applicants deterred from filing within the 30-day period provided for people in deportation

INS contends that equitable tolling is inapplicable because: (1) the 12-month IRCA application period is substantive, not procedural, like a statute of limitations, (2) INS did not engage in affirmative misconduct in this case, and (3) plaintiffs neither actively pursued their judicial remedies nor was their inaction induced by INS' conduct, Pet. Bf. 33-35, contentions that are flatly contradicted by both the facts and this Court's tolling jurisprudence.

First, "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Const. Co. v Utah*, 414 U.S. 538, 557-58 (1974).[50] Tolling here is not only consonant with Congress' intent, it is the only way to fulfill the basic purposes of IRCA. See further discussion *infra* at 45-46.[51]

Second, "affirmative misconduct" on the part of INS is unnecessary, though the record abounds with such evidence. Judge Posner, relying on this Court's cases, explained last year, that equitable tolling -- as opposed to estoppel -- "does not assume a wrongful -- or any -- effort by the defendant" to prevent the plaintiff from acting.[52] While *Irwin* noted that a particularly apt case for equitable tolling is one, as here, "where the claimant has actively pursued his judicial remedies ... *or* where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," *id.* 458 (emph. added), the "or" was not inadvertent, as the cases in the preceding footnote make clear.

Misconduct, while unnecessary, ought to bear on the question of the balance of the equities. *Bowen v. City of New York*, 476 U.S. 467 (1986) is poignantly instructive. A Social

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hearings. § 1255a(a)(1)(B); *Matter of* ---, (Northern Reg. Proc. Cntr. June 27, 1988) (Am. Immig. Lawyers Assoc. reprint no. LO988-347) (late application accepted because applicant turned away when attempted to file); *Matter of* ---, (Northern Reg. Proc. Cntr. March 14, 1988) (Am. Immig. Lawyers Assoc. reprint no. LO688-189) (same). However, in these cases, INS remains adamant that class members were initially ineligible under illegal regulations and now remain ineligible solely because the time to file has closed.

52 *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1991), citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (time bar tolled if despite all due diligence one is unable to obtain vital information bearing on a claim), which is based on *Bailey v. Glover*, 88 U.S. 636, 638, 21 Wall. 342, 348 (1875). Accord *American Pipe & Const. Co. v. Utah, supra*, 414 U.S. at 557-58; *Honda v. Clark*, 386 U.S. 484, 486, 501 (1967).

INS appears to mix concerns that arise under estoppel with those of tolling. *Lyng v. Payne*, 476 U.S. 935, 936 (1986) (emph. added), rejected a similar argument by the USDA:

> that any remedy that can be analogized to an equitable estoppel is necessarily invalid...unless the plaintiff succeeds in proving all the elements of common-law estoppel. *Cf. Honda v. Clark*, 386 U.S. 484, 494-945. *Indeed, any other rule has the potential for divesting the courts of the remedial authority specifically envisioned by Congress under the APA.*"

Id. (Emph. added).

Security applicant class sought benefits in plain contravention of the 60-day appeal period, which was nonetheless tolled because "the Government's secretive conduct...prevent[ed] plaintiffs from knowing of a violation of rights, [and] statutes of limitations have been tolled until such time...[to allow for] a reasonable opportunity to learn the facts ..." *Id.* 481. The analogous point here is that INS' practices also violated IRCA; what is different here than in most tolling cases is that INS' practices also violated INS' *affirmative* statutory obligations to engage in an "extensive education and outreach" program that conveyed accurate information. H. Rep. 73. See also § 1255a(i) (Attorney General must "broadly disseminate information respecting the benefits which aliens may receive and the requirements to obtain [legalization]").

Third, how much more diligence can be asked? *CSS* was filed six days after IRCA became law; the *LULAC* plaintiffs sued within two months after the operative regulation was adopted. JA 5. Moreover, untold numbers actively pursued their administrative remedies, attempting to file applications until "front desked," or seeking assistance from INS' agents, the QDEs, until informed they did not qualify. See evidence discussed at nn. 18, 20, 25 and 27, *supra*. INS argues that "Respondents plainly did not 'actively pursu[e] their remedies'; if they had filed timely applications, the matter would not have reached this Court." Pet. Bf. 33. That may be true, *if INS or the QDEs had accepted the applications*. Instead, it rejected them and informed class members they were ineligible. That should be enough; class members could do no more than file these lawsuits.

INS should not be heard to insist on strict compliance with a largely procedural provision of a statute, when its application would preclude any meaningful remedy for its unlawful failure to comply with other clearly substantive provisions of that same statute. Such a "one-way ratchet" is fundamentally unfair, is contrary to the *Bowen* doctrine, and would contravene the fundamental purposes of IRCA.

Application of the *Bowen* test that a court should be guided by "*overall* congressional purpose" of the legislation, *id.* 480 (emph. added), *necessarily* means that the time limitation is to be subordinated to assure that the "overall congressional purpose" will be served. In short, it is a conclusion that Congress, if faced with the specific set of equities, would have intended such an outcome. For that reason, the doctrine is a presumption read into every statute. See *supra* at 36. The basic question is if tolling would be "consistent with the *overall* congressional purpose." *Id.* 480 (emph. added). Here, such consistency is manifest in the lower court orders since IRCA's basic purpose is clearly to maximize the number of legalizable aliens so that future enforcement activities can be focused on the borders, which can be accomplished only by ensuring a *full* twelve months to apply, preceded by an *accurate* education program, during which undocumented aliens would get *correct* advice and be encouraged to come "out of the shadows" and apply. (See further, *supra*, pp. 3-4).

INS nevertheless argues that because IRCA contains "an express preclusion of judicial or administrative review of denials based on a failure to file in time, [*Bowen*] does not justify the relief affirmed by the court of appeals." Pet. Bf. 33. However, that preclusion has no bearing here since class members, by definition, have received no "denials." INS simply "rejected" their applications, thereby thwarting the opportunity to receive denials, and stays of deportation and work permits.[53]

53 Interestingly, class members who did receive "denials" because they somehow convinced INS to accept their applications need no further judicial remedies since INS has agreed to reprocess their applications under the proper standards. INS's outreach program both attempted to encourage those who were eligible to come forward and apply, and discourage those who were ineligible from applying. Those class members who actually tried to file applications represent failures in INS's outreach education program. Those who learned of their "ineligibility" through INS's outreach campaign, and concluded that it was futile to file an application, represent the successes and effectiveness of INS's outreach program.

INS also argues that equitable tolling applies only when "the challenged policy was 'a secret, internal policy,' rather than a published regulation." Pet. Bf. 33, quoting *Pittston Coal Group v. Sebben*, 488 U.S. 105, 123 (1988). First, neither *Bowen* nor *Pittston Coal* indicate that secrecy is a necessary element for the application of equitable tolling.[54] Second, both the individual harm, and the frustration of Congressional will, are identical under a "secret, internal" policy, or the equally internal INS "rejection" policy. In fact, the "advance parole" policy was "internal and secret" from the effective date of enactment, November 6, 1986, to May 1, 1987, when INS issued its legalization regulations, and the pol cy to "reject" applications was throughout a "secret, internal policy" set forth only in an agency manual, rather than published, as required under the APA, in the Federal Register.

Finally, INS' adoption of an unpublished policy of rejecting class members' applications, plainly resulted in class members being "induced ... into allowing the filing deadline to pass." Nothing in IRCA's text or legislative history indicates that Congress intended to exclude aliens who did not file timely applications solely because INS illegally deemed them to be ineligible and the rejected their applications or convinced them not to apply.

Bowen stressed that the Social Security Act is "'unusually protective' of claimants." *Id.* 480 (citation omitted). The same can be said of IRCA given Congress' insistence that the law be construed "in a liberal and generous fashion," H.R. Rpt. 72, that INS operate an extensive education and outreach program, that aliens be buffered from INS by extensive confidentiality protections and by QDEs, and that those who came forward to apply be given interim stays of deportation and work permits based on the presentation of prima facie claims to eligibility. *Bowen* concluded: "All of the class members who had failed to

54 See generally De Ford, *Pittston Coal Group v. Sebben: What Is Its Significance, If Any, for Social Security Class Actions*, 22 Clearinghouse Review 1407, 1409-10 (1989).

comply with the time limitation were entitled to believe that their Government's determination of *ineligibility was the considered judgment of an agency faithfully executing the laws ...*" *Id.* at 480 (Emph. added). So too here, and doubly so.[55]

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55 Due process is another basis for relief in this case. See *McNary*, 895 (alien's interest in legalization "plainly sufficient to mandate constitutionally fair procedures in the [legalization] application process"); *Agosto v. INS*, 436 U.S. 748, 753 (1985) (deportation, the likely result of denial of a meaningful opportunity to apply for legalization, "may result in loss of both property and life; or all that makes life worth living"); *In re Thornburgh*, 869 F.2d 1504, 1514-16 (D.C. Cir. 1989). As recently explained by this Court, the loss of a reasonable opportunity to apply for legalization involves loss of the right to earn a livelihood for applicants and their family members, many of whom are U.S. citizens, and it exposes individuals to potential deportation and separation from their families. *McNary* 895. See further, *Moser v. United States*, 341 U.S. 41 (1951); *United States v Pennsylvania Ind. Chem. Corp.*, 411 U.S. 655 (1973). While due process was pleaded below, CRC 72, p. 33, these claims were not reached. Therefore, if the Court holds that the district courts were statutorily precluded from granting relief, the cases should be remanded to the district courts so that they may rule on these claims in the first instance.

B. *Pangilinan* In No Way Bars Injunctive Relief in These Cases

INS' argument that the district court orders tolling the application deadline contravene *INS v. Pangilinan*, 486 U.S. 875 (1988), was rejected by the courts below, as well as the Second Circuit in *Perales v. Thornburgh*, at *811-14*. It founders for three key reasons, which are not limited, as INS claims, to the argument that "*Pangilinan* should be strictly limited to cases in which the court's order directly requires naturalization." Pet. Bf. 30. First, it ignores the significant doctrinal change in this Court's equitable tolling jurisprudence articulated in *Irwin* two years after *Pangilinan*. Second, it ignores the basic difference between the unique role that courts play in the naturalization process, which was determinative in *Pangilinan*. And, third, it ignores the conclusion in *Pangilinan* that there was no statutory or constitutional violation to remedy.

In essence, INS argues that *Pangilinan* allows it to act above the law--that it could have implemented legalization in a manner which violated *every* provision of the statute, every jot and tittle, and thwarted *every* eligible applicant from applying. Then, the courts would be totally impotent if they could not have acted before May 4, 1988. In short, for INS, justice is a race. However, *Pangilinan* does not countenance such a radical constriction of Article III powers. This Court did not, in *Pangilinan*, unanimously jettison hundreds of years of Anglo-American law. It simply determined that traditional equitable powers did not extend to a particular set of forty-year old legal and factual issues, where Congress' intent had been fulfilled, where no statutory *or* constitutional violation occurred, and where the district court was acting as a special tribunal, a "naturalization court."

Pangilinan reviewed a district court order that granted naturalization to aliens who had applied after Congress' express time limit. This Court explained that the "more fundamental" problem with the order was that "the power to make someone a

citizen...has *not* been conferred upon the federal courts *like [the power to order] mandamus or injunction*...[except] in strict compliance with the terms of the authorizing statute." 486 U.S. at 883-84 (emph. added). In short, a court exercising naturalization powers acts under an express Congressional delegation, more like an administrative agency that can act only strictly within its delegated powers. It is this context that *Pangilinan* said: "more fundamentally ... the power to make someone a citizen...has not been conferred upon the federal courts, like mandamus or injunction as one of their generally applicable powers." *Id.* 884.

Pangilinan amplified on this point in several different ways: "'A person may be naturalized...in the manner...prescribed [in the INA], and not otherwise,'" *Id.*, quoting § 1421(d); "'Once it has been determined that a person does not qualify for citizenship ... the district court has no discretion to...grant citizenship,'" 486 U.S. at 884 (citation omitted); "Neither by application of the doctrine of estoppel ... nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Id.* See further, 4 Gordon & Mailman, *Imm. Law & Proc.* § 94.02[1], p. 94-24.

A district court does not act *qua district court* when it exercises naturalization powers. Rather, it is acting as a special "naturalization court," which was defined in § 1101(a)(24) to include, but not be limited to, district courts.[56] From 1790 to 1990, "naturalization courts" *also* included state or territorial courts. 4 Gordon & Mailman, *supra*, § 94.02[1], p. 94-24; see

[56] Congress provided in P.L. 101-649, § 401, 1990 Stat. 4978, 5038, amending 8 U.S.C. § 1421, for the cessation of judicial naturalization so this discussion is historical, not descriptive of the contemporary role. Now, it is an unalloyed executive function. "[T]he Attorney General now has the power to make decisions on naturalization applications; recommendations [to a naturalization court] are a thing of the past." 4 Gordon & Mailman, *supra*, § 94.01[2][f], p. 94-12. Now, the federal courts serve in a pure judicial capacity, judicial reviewing the Attorney General's decisions. *Id.* See generally, *id.* § 94.01[1][f], pp. 94-11 to 94-14.

further, *id.*, pp. 94-20 to 94-26. Indeed, the hybrid nature of a naturalization court is clear from the fact that from 1906 to 1990, "naturalization was the *joint* responsibility of the courts and administrative officers ..." *Id.* p. 94-18 (emph. added). This unusual blending of judicial and executive powers reinforces the characterization of such courts as a quasi-administrative agencies, with delegated powers strictly circumscribed.

C. Denial Of Relief In This Case Would Frustrate The Public Policy Established By Congress In IRCA

In *Pangilinan* , certiorari was granted specifically to resolve the conflict between the Second and Ninth Circuit's construction of the 1940 Nationality Act. 486 U.S. at 877.[57] This Court accepted the Second Circuit's view of INS' statutory arguments. *Id.* at 878. The decision centered on the conclusion that Congress' purposes underlying the Act had been fully achieved through the Attorney General's procedures adopted to implement the Act.[58] Therefore, there simply was no statutory violation to

[57] The only conflict between those courts was whether the Attorney General had violated the terms of the Act by not having a full-time representative on site in the Philippines to accept naturalization applications. The Ninth Circuit held that the Act required a naturalization officer in the Philippines during the middle nine months of the 18-month statutory application period. *Pangilinan v. INS*, 796 F.2d 1091, 1097-1101 (9th Cir. 1986). The second circuit flatly disagreed. *Olegario v. United States*, 629 F.2d 204, 223-28 (2d Cir. 1980). The briefing in *Pangilinan* similarly focused on whether the Attorney general had violated the intent of Congress. See Reply Memo. for INS at 2-3; Brief For The Petitioner at 30-41, Argument B.1 ("The Attorney General's Revocation of the Vice Consul's Naturalization Authority Did Not Violate the 1940 Act"); Reply Br. for the Pet. at 4-6.

[58] Thus, although a representative was not present in the Philippines throughout the entire 17-month period, a consular official was present for eight months, including the most critical five months at the close of the statutory applications period. *Id.* at 885. The Court held that the latitude provided in the 1940 Act to process petitions by officers traveling post to

remedy. The contrast here could not be greater. Here, INS *concededly* violated IRCA. Here, the legislative purpose is plainly frustrated by denying relief to persons that Congress wanted legalized.

In *Pangilinan* this Court did *not* analyze whether the deadline for filing a naturalization petition was either substantive, jurisdictional, or in the nature of a statute of limitations.[59]

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post, together with thousands of Filipinos' success in attaining naturalization despite the removal of consular authority, fully satisfied the requirements imposed by Congress--just as the Second Circuit had concluded and as INS had argued at length in its briefs in this Court. The Court pointedly noted that "[t]he approximately 7-month presence of a naturalization officer in the Philippines . . . compared favorably with the mere periodic presence of such officers elsewhere in the world." *Id.* at 886.

[59] As we discussed at p. 37, *supra*, the Court does not focus on whether a statute is substantive or procedural. *Glus v. Brooklyn East. Dist. Term.*, *supra*, explicitly held that even a "substantive" limitations statute could be tolled. *Glus* held that earlier Supreme Court decisions to the effect that equity is of no help when "[t]he liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of right" -- the argument INS makes here --was "dicta and *is neither binding nor persuasive*." *Id.* 235 and n. 11 (emph. added).

Burnett v. New York Cent. R.R. Co., 380 U.S. 424 (1963), dealt with a deadline for filing actions under the Federal Employers Liability Act (FELA). The court of appeals concluded that the limitation was contained in the same Act which creates the right, it was "substantive" and not "procedural" and therefore could not be tolled. *Id.* 425. As INS argues here, the court of appeal in *Burnett* reasoned that "[f]ailure to bring the action within the time prescribed extinguished the cause of action." *Id.* 426. This Court disagreed:

> The basic question...is one 'of legislative intent whether the right shall be enforceable...after the prescribed time....'Classification of such a provision as 'substantive' rather than 'procedural' does not determine whether or under what circumstances the...period may be extended....[Instead, the] basic inquiry is whether *congressional purpose is effectuated by tolling the statute* of limitations in given circumstances.

Id. 426-27 (emph. added). See also *Badarraco v. CIR*, 464 U.S. 386, 388 (1984) (same); *Zipes v. Trans World Airlines*, 455 U.S. 385

Rather, as we suggest, the Court focused on Congressional intent; in that case compliance with the deadline was "enforcing the public policy established by Congress." *Id.* 883. Taking precisely this perspective, *Pangilinan* repeatedly emphasized that the Congressional purposes underlying the 1940 Act -- which it stated "could not be more manifest," *id.* 884 -- had been fully achieved through the procedures established by the Attorney General to implement the Act. *Id.* 884-85.[60]

Here, by contrast, the purpose of the 12-month application period was designed to insure that the amnesty program could be operated efficiently and effectively within the limited budget appropriated for its implementation, supplemented by the fees charged to applicants to cover the costs of the program, and ended relatively quickly. The basic purposes were to radically reduce the number of undocumented aliens in the U. S., both to end the negative societal consequences of their underground lives and employment, and to sharply refocus future enforcement along the borders. These purpose would be completely frustrated if INS' interpretation of § 1255a(f) were adopted.

In fact, one can barely imagine anything that would more frustrate these purposes than a decision in INS' favor, a decision which would result in as many as 300,000 legalizable aliens, all "continuous" residents since at least 1981, few likely ever to abandon their residence, reverting to undocumented status, outside of Government control, evading apprehension, working for employers willing to violate IRCA's employer sanctions

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(1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 427 (1982); *Honda v. Clark*, 386 U.S. 484, 501 (1967).

[60] This Court's evaluation of Congress's intent in *Pangilinan* was further underscored by Congress's adoption in 1948 of "a new liberalized citizenship program that excluded Filipino servicemen, and specifically provided that even applications timely filed under the 1940 Act and still pending would be adjudged under the new provisions." *Id.* 884. Thus, Congress, in revisiting the issue, expressly indicated an intent to restrict the naturalization opportunities of Filipino servicemen.

provisions. Adoption of INS' position would add more undocumented aliens to the streets of the nation in one fell swoop than any single action undertaken by any government or alien smuggler in our history. Nothing could be more contrary both to the national interest and to the express purpose of Congress -- other than perhaps opening the border to illegal crossings for several months.[61] If INS had acted properly, the class members today would already be lawful permanent residents.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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61 As noted above, to hold otherwise leads to absurd results Congress could not have and did not contemplate. Under the INS' interpretation of § 1255a and *Pangilinan*, INS could have limited the entire legalization application period to five minutes at midnight on a Sunday evening, without remedial judicial intervention.

No. 91-1636

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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Two themes dominate the briefs of respondents and their *amici*: the assertion that the legislative history of the Immigration Reform and Control Act of 1986 (IRCA) requires this Court to interpret IRCA "in a liberal and

generous fashion," Resp. Br. 4 (emphasis omitted); see Cities of Chicago et al. Br. 7-11; Church World Service Br. 7-13; and the contention that the Immigration and Naturalization Service (INS) implemented IRCA in a harsh and inhospitable manner, see, *e.g.*, Resp. Br. 5, 7-12. In our view, neither of those themes contributes to an appropriate analysis of the questions presented by our petition.[1]

a. First, as we explained in our reply brief at the petition stage (Pet. Reply Br. 9 n.11), general statements of liberal intent extracted from IRCA's legislative history are not useful in answering the questions presented in these cases, which turn on the provisions Congress chose to enact into law. Those provisions make clear that Congress did not intend to pursue the liberal and generous purposes behind IRCA "at all costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987). Rather, Congress imposed a number of significant limitations on the program, two of which are relevant here: it limited judicial review to a single, expedited course; and it limited relief to aliens who applied during a brief and specified time period. Those limitations cannot be explained as the product of the "liberal and generous" motives on which respondents rely; accordingly, we do not think that those motives offer a basis for departing from the language Congress chose to use when it enacted those limitations.[2]

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[1] Respondents also commence their brief by asserting (Resp. Br. 1) that the government's "statement of the opinions below is erroneous in several respects." Their discussion, however, does not identify any error in our statement; it simply includes a number of opinions to which our statement does not refer. They do not suggest that any of the opinions omitted from our statement contribute significantly to an understanding of the procedural background of the case or bear in any way on the questions presented by our petition.

[2] As this Court has explained, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

b. Second, the legalization program under IRCA was a great success. The estimates before Congress of the number of aliens who would be legalized under the program varied,[3] but it is clear that INS's implementation of the program resulted in substantially more applications than Congress expected: 1,750,530 as of June 27, 1992. See Gov't Br. 5 n.4. Moreover, the suggestion that INS interpreted the eligibility provisions in a manner calculated to limit the availability of relief to the aliens at whom the program was directed is belied by the objective fact that INS has granted about 94% of the applications it has processed to date. See Gov't Br. 5 & n.4.[4] Nor is it appropriate to assume, as respondents suggest (Resp. Br. 9 n.14, 14-15), that the regulations at issue in these cases clearly violated IRCA simply because the government chose not to challenge the district court orders invalidating those regulations. Given the limited effect of the regulations, which applied only to the program at issue in these cases, designed to end more than four years ago, the

[3] The Senate Report predicted 565,000 applications, S. Rep. No. 132, 99th Cong., 1st Sess. 64 (1985); the House Report predicted 1,400,000, H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. I, at 132 (1986).

[4] Respondents also suggest (Resp. Br. 9) that INS dragged its heels in implementing provisions of IRCA (codified at 8 U.S.C. 1255a(e)(1)) that granted some protections to aliens even before the application period began. INS's response on this point was entirely reasonable. The "telex" to which respondents refer, Legalization Wire # 1, CO 1588-P (Nov. 14, 1986), was a 20-page document providing detailed instructions to INS district offices regarding proper procedures for implementing 8 U.S.C. 1255a(e)(1). INS issued this document only eight days after the President signed IRCA into law. See J.A. 183 (reprinting a portion of the document). The entire document appears in the record as an attachment to the November 24, 1986, Decl. of Peter A. Schey, Clerk's Record (CSS) item 9.

government's decision is readily understandable on other grounds.

2. On the jurisdictional question, respondents make only a passing attempt (Resp. Br. 32 n.44) to rebut our analysis of the language of Section 1255a(f), choosing to rest their argument primarily on their view that this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), "broadly held" to the contrary (Resp. Br. 23-26), and on the contention that application of the statute as we understand it would be unduly harsh (Resp. Br. 28-32).[5] None of respondents' arguments on those three points is persuasive.

a. We explained in our opening brief that 8 U.S.C. 1255a(f)(1) bars the actions before the Court because each of the individual respondents challenges a regulation delineating the qualifications for adjustment of status, because each regulation is a "determination,"[6] and

[5] Respondents also assert (Resp. Br. 32-34) that Congress's incorporation of 8 U.S.C. 1105a into Section 1255a(f) "shows that district court review of systemic practices and regulations is appropriate." Resp. Br. 32. As we explained in the petition (Pet. 14 n.17), Section 1105a actually supports our position, because it would be odd to conclude that exhaustion is not required under Section 1255a—with its express preclusion of alternate forms of judicial review—in circumstances (like these) where Section 1105a itself would require exhaustion. Moreover, as we pointed out in our reply brief at the petition stage, respondents' construction of Section 1105a is unsupported in the decisions of the lower courts on which respondents rely. As we explained there, all of those decisions "involve challenges to allegedly improper procedures; none involves a claim that the agency improperly interpreted the substantive requirements for relief." Pet. Reply Br. 7; see Pet. Reply Br. 7 n.8 (describing the facts of respondents' cases). Respondents have not attempted to rebut our description of those cases; indeed, their brief on the merits simply duplicates the citations contained in their brief in opposition. See Resp. Br. 33 n.45; Br. in Opp. 21 n.23.

[6] Respondents' amicus American Bar Association (ABA) contends that our reading of the term "determination" is implausible, arguing

because, with regard to each of those aliens' claims, each regulation is a determination "respecting [that alien's] application for adjustment of status."[7] Gov't Br. 17-19.

that Congress intended to incorporate into Section 1255a(f)(1) the distinction between a "rule" and an "adjudication" as those terms are defined in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* ABA Br. 5-6. Section 1255a(f)(1), however, contains neither the term "rule" nor the term "adjudication"; if anything, Congress's decision not to use the well-recognized terms found in the APA suggests that it intended a different meaning.

The ABA also criticizes our reading of the term "determination" as leading to the "anomalous result that the administrative appellate authority * * * would have the power to entertain facial challenges to the regulations themselves." ABA Br. 6. That criticism is incorrect. Although the Legalization Appeals Unit (which is under the direction of the Associate Commissioner for Examinations) gives content to the regulations by construing them and determining how they apply in individual cases, it is bound by the regulations themselves, because the Attorney General has adopted them. See *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1023 (5th Cir. 1990) ("The INS cannot permit the LAU to deviate from the regulations. Once regulations are enacted, the INS, and even the Attorney General, who oversees and commands the Service, are required to comply with their commands."); 8 U.S.C. 1103(a) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. 103.1(f) (delegation of authority to the Associate Commissioner for Examinations, which does not include authority to overturn regulations). Instead, the validity of the regulations should be tested by the regional courts of appeals on review of final orders of deportation.

[7] We see no force in the ABA's argument (ABA Br. 6 & n.3) that the reference in Section 1255a(f)(1) to a determination "respecting" an application cannot bear the meaning customarily accorded the term "respecting," based on the ABA's view that the phrase must have the same meaning as the reference in Section 1255a(f)(3)(b) to a determination "on" an application. Because that argument rests on the premise that the two different phrases should bear identical meanings, it runs into the considerable headwind posed by the principle that courts should be reluctant to assume that Congress used different phrases to express the same concept. Moreover, the different contexts in which the phrases appear lend support to the view that the different phrases

Respondents do not directly address our interpretation of the statutory language, but instead suggest (Resp. Br. 32 n.44) that Congress considered, and rejected, our position when it failed to adopt a related Senate bill, S. 1200, 99th Cong., 1st Sess. (1985). S. 1200, however, would have barred all judicial review whatsoever with respect to any "decision or determination under [Section 1255a]." S. 1200, *supra*, § 202 (proposed 8 U.S.C. 1255a(f)(1)). The fact that Congress chose a narrower preclusion of review provision, which plainly permits judicial review of *some* INS actions under Section 1255a, does not shed a great deal of light on the question before the Court: how far did Congress go in allowing judicial review.[8] The best guide on that question is the language of the statute Congress enacted.

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should have different meanings. Paragraph (1) of 1255a(f) is the preclusion of review provision, which contains the broadest language in the entire subsection—channelling all litigation regarding any "determination" that "respect[s] an application" into one course of review. Paragraphs (3) and (4), which provide the avenues for review, logically might refer to narrower classes of determinations, reflecting a congressional decision that a "determination" should be subject to certain types of review only at certain stages in the process: paragraph (3) contemplates review of a determination "on" an application, based on the view that administrative appellate review would be applied only to determinations that have reached the stage of denial of a particular application, see 8 C.F.R. 103.1(f)(2)(xxvii), 245a.2(p) (providing for administrative review in those circumstances); and paragraph (4) contemplates review only of a "denial" of an application. See Gov't B 19 & n.18.

[8] We do note, however, that some of respondents' specific comments about S. 1200 are misleading. First, we are unable to understand respondents' suggestion (Resp. Br. 32 n.44) that Section 1255a(f)(1) somehow fails to refer to regulatory determinations under Section 1255a(g) because, in respondents' view, Section 1255a(f)(1) does not refer to "this section." Section 1255a(f)(1), like the analogous provision in S. 1200, describes the type of determination as to which judicial review is precluded as a "determination * * * under this section." Because subsection (g) appears in Section 1255a—the same section that Section

b. Although respondents rely heavily on this Court's decision in *McNary*, their presentation makes it clear that they can prevail only under a reading of *McNary* that divorces that decision from the situation before the Court in that case. As respondents implicitly acknowledge, they can prevail only if *McNary* "broadly held" that individuals seeking legalization can bring any claim whatsoever directly in the district courts, provided they bring the claim in the form of a class action, challenging application of an INS policy to more than a single individual. See, *e.g.*, Resp. Br. 24 (IRCA's preclusion provisions "apply *only* to individual challenges to those policies applied on a case-by-case basis").[9] Hence, they must present *McNary* as a case

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1255a(f) appears in—determinations under subsection (g) are covered by the statutory language.

Second, we see no substance to the argument that the preclusion provisions in Section 1255a(f) cannot apply to determinations made under Section 1255a(g), because "in the final version of IRCA" the authority to promulgate regulations appears later in the statute than the preclusion provisions in Section 1255a(f). Resp. Br. 32 n.44; see ABA Br. 7 n.3. The provisions appeared in the same order in S. 1200, which plainly contemplated preclusion of review with respect to the claims at issue in this case, by precluding all judicial review of *any* claim. See S. 1200, § 202 (proposed 8 U.S.C. 1255a(f) and (g)).

[9] Respondents' amicus ABA argues at length (ABA Br. 16-24) that the efficiencies inherent in class actions support a ruling in respondents' favor, suggesting that our position is designed to "preclude amnesty applicants from proceeding as a class under Fed. R. Civ. P. 23." *Id.* at 16. This case presents no issue under Rule 23; whatever claims aliens are permitted to bring in district courts, they will be able to bring them as class actions if they can satisfy the requirements of Rule 23. *McNary* itself is evidence that such class actions can proceed in certain circumstances. The issue in this case, by contrast, is whether the claims respondents present are cognizable by the district courts at all. In any event, as the protracted proceedings in this case make clear, a complicated class action in the district court is not invariably the most efficient way to secure a speedy and definitive resolution of a legal question that arises out of INS's construction of IRCA. In some cases,

that "broadly held" that the preclusion provisions apply only to a challenge to the denial of a single application. *Id.* at 23. But whether one agrees with the Ninth Circuit's decision in these cases or the D.C. Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), it is untenable to characterize *McNary*'s holding so broadly, because the facts of the case before the Court in *McNary* did not present any occasion for such a broad holding. As we explained in our opening brief (Gov't Br. 20-23), a major focal point of the decision in *McNary* was the conclusion that denial of jurisdiction would "foreclose all forms of meaningful judicial review." 111 S. Ct. at 898. Faced with that point, the Court concluded that "[t]he strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of [IRCA]." *Id.* at 899. Because that presumption is not applicable here, *McNary*—although relevant—does not control the decision of these cases.

c. As the court's decision in *McNary* makes clear, a key factor in these cases is the availability of effective judicial review to respondents under Section 1255a(f). Although respondents argue that the system Congress created in Section 1255a(f) is inadequate (Resp. Br. 28-32), that argument rests on an inaccurate description of several aspects of the process, coupled with a fundamental disagreement with the policy choices Congress made when it enacted Section 1255a(f).

The portion of respondents' brief that addresses the availability of judicial review makes two inaccurate statements about INS's procedures. First, respondents contend that established INS policies barred individual

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it would be swifter to follow the way designed by Congress—challenging the legalization decision directly in the court of appeals, as a defense to any deportation order the Attorney General might issue.

members of the respondent classes from filing applications for legalization. See, *e.g.*, Resp. Br. 16-17; 29. In support of that contention, respondents point out that INS's Legalization Manual required clerks to reject an application "if the applicant is statutorily ineligible." J.A. 188 (quoted at Resp. Br. 16). Although respondents suggest that the Manual reflects a draconian desire to trick eligible individuals into forfeiting their claims for relief, a fair reading suggests a much more charitable concern: in light of the significant filing fees,[10] it is not at all unreasonable of INS to inform aliens of its view that their applications are deficient *before* it accepts the filing fee, so that they can make an informed choice about whether to pay the fee if they are not going to receive immediate relief. Moreover, contrary to respondents' assertions, the policy did not bar applicants from seeking relief through normal channels if they believed INS had erred; the very same page of the Legalization Manual provides: "If an applicant whose application has been rejected * * * insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip * * * stating the noted deficiency(ies)." J.A. 188. Hence, INS procedures would have allowed members of the respondent classes to file applications if they wished to challenge INS's view that they were not entitled to relief.

Second, respondents state twice (Resp. Br. 28 n.36, 30 n.39) that an alien would not be able to secure review of an adverse legalization determination by surrendering to INS. That statement is incorrect; any alien who wishes to challenge an adverse determination on his legalization application may secure review by surrendering for

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[10] The fees for filing a legalization application (Form I-687) range from $185 for an individual to $420 for a family. 8 C.F.R. 103.7(b).

that granting such work authorizations would encourage unfounded appeals and unfairly diminish job opportunities for those who are legally residing in this country. Cf. *INS* v. *National Center for Immigrants' Rights*, 112 S. Ct. 551, 558 (1991) (*NCIR*) (noting that "preserv[ing] jobs for American workers" is an "established concern of immigration law"). That choice places a serious burden on individuals like those in the respondent classes who took the effort to file applications before the application period expired, but it did not deprive them of an opportunity for effective judicial review. The fact is, Congress has not chosen to grant persons subject to deportation a general authorization to work during the pendency of their legal challenges. Indeed, as this Court held last year in *NCIR*, INS is entitled to detain individuals pending resolution of their deportation proceedings unless they agree that they will not work unlawfully. Respondent's discussion on this point in fact reflects nothing more than a disagreement with the policy chosen by Congress.[14]

The bottom line is that respondents are a group of individuals who had a different view of the legalization requirements from INS and thus believed that they were eligible for relief, but would not have been immediately successful if they had sought legalization from INS. Their desire to short-circuit the process and go directly to the district courts flies in the face of Congress's determination that litigation about INS's refusal to grant legalization applications should await the entire administrative process—including deportation proceedings—and should be channeled directly to the courts of appeals, for one final decision that would determine

[14] An analogous problem for aliens challenging their deportation appears in the provision in the Immigration and Nationality Act that requires aliens in deportation proceedings to pay for their own counsel. See 8 U.S.C. 1252(b)(2) ("the alien shall have the privilege of being represented (at no expense to the Government)").

definitively whether the alien is entitled to stay in this country. The contrary decision of the court of appeals should be reversed.

3. Respondents' arguments on the remedial question are even less persuasive than their arguments on the jurisdictional question.

a. Respondents' argument focuses on their repeated assertion that these cases involve individuals from whom INS unlawfully refused to accept applications.[15] That assertion is incorrect: these cases do not involve individuals from whom INS refused to accept applications; they involve individuals who did not file applications because they believed INS would deny relief. The government concedes that any individual who actually attempted to file an application (accompanied by the appropriate filing fees) during the application period, but failed because government agents refused to accept it, would be an individual who "appl[ied] for * * * adjustment" within the meaning of 8 U.S.C. 1255a(f) (1)(A).[16] Similarly, in our view, any refusal by INS to allow an individual to file an application, would constitute a "denial" of the application reviewable in the courts of appeals in

[15] See, *e.g.*, Resp. Br. 16 (stating that "INS and its QDEs refused to accept applications submitted by class members"); *id.* at 35 n.47 ("a large number of the class members actually tried to file applications with INS or its QDE agents"); *id.* at 40 (stating that "INS simply 'rejected' th[e] applications [of class members]").

[16] Such a showing would require an alien to demonstrate that the government agent refused to accept the application despite INS's written procedures, which required the government to accept applications from aliens the government believed to be ineligible if the alien insisted. See pages 8-9 *supra*. As respondents acknowledge (Resp. Br. 38 n.51), INS has granted relief to individuals who can establish that they actually had attempted to file a timely application.

connection with any order of deportation entered against the alien, as provided by 8 U.S.C. 1255a(f)(4)(A).[17]

In any event, the question whether the district court could grant relief to an alien if INS improperly refused to accept an application is not properly before the Court. First, the classes defined by the district courts are not classes of aliens who attempted to file; they are classes of aliens who chose not to file. See Pet. App. 25a (*CSS* class includes aliens who "knew of [the challenged] regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application"); J.A. 216 (*LULAC* class includes aliens who, "relying upon information that they were ineligible, did not apply for legalization before the * * * deadline"). Second, respondents have failed to establish that any of the named class representatives in either case attempted to file applications.[18] Accordingly, there is no reason for the Court to consider the proper treatment of turnaways. Cf.

[17] INS regulations also allow the regional processing facility to reconsider the denial *sua sponte* if the applicant files an appeal to the Associate Commissioner; similarly the Associate Commissioner may reopen any prior decision he has made. See 8 C.F.R. 103.5(b); *In re O—*, 19 I. & N. Dec. 871, 871 (L.A.U. 1989) (reopening is proper if "manifest injustice would occur if the prior decision were permitted to stand"). Proceedings have been reopened under this regulation in several cases. See, *e.g.*, In re O—, supra; *In re N—*, 19 I. & N. Dec. 760, 760 (L.A.U. 1988); *In re S—*, 19 I. & N. Dec. 851, 854 (L.A.U. 1988).

[18] See First Amended Compl. ¶¶ 18-22, Clerk's Record (LULAC) item 56, at 11-15 (four class representatives filed timely applications; the fifth declined to file based on media reports and the advice of an attorney); Sixth Amended Compl. ¶¶ 18-29, Clerk's Record (CSS) item 140, at 12-25 (description of factual circumstances of class representatives; no allegation that class representatives were turned away). We note that respondents offer no record support for their allegations (see note 15, *supra*) that INS improperly refused to accept applications from members of the respondent classes.

Fed. R. Civ. P. 23(a)(3) (class representatives must have claims "typical of the claims or defenses of the class").

b. Turning to the classes of respondents before the Court, it is clear that there is no basis for the court of appeals' decision to require INS to consider their claims for relief. At bottom, respondents' argument is that INS truthfully publicized its view of the requirements for relief under IRCA, and respondents decided not to file. If respondents are correct in arguing that those circumstances are adequate to justify circumvention of statutory filing deadlines, then no party need ever seek relief from a government agency in a timely manner if it disagrees with the agency's interpretation of the requirements for relief; it instead can ignore filing deadlines and sit back waiting for a definitive legal resolution of the controversy. That result cannot be, and is not, correct.

Respondents rely (Resp. Br. 35-42) on the doctrine of equitable tolling, as enunciated by this Court in *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1991), but nothing in *Irwin* supports respondents. First, *Irwin* dealt with statutes of limitations and other "statutory time limits applicable to lawsuits." *Id.* at 457. These cases, by contrast, present an argument that the Executive Branch must grant relief in the absence of one of the statutorily mandated requirements for relief, Section 1255a(a)(1). Even though equitable tolling may be available with respect to statutes of limitation, it should not be applied to contravene a specific requirement for relief, especially in a case, like this one, where Congress has precluded any admin-istrative or judicial review of denial of an application for failure to meet that requirement, see Section 1255a(f)(2); Gov't Br. 32 & n.34.[19]

[19] Contrary to respondents' contentions (Resp. Br. 37 n.51), INS did not grant relief to any class of individuals that failed to apply for

In any event, even if equitable tolling principles apply, they would not support relief in these cases any more than they supported relief in *Irwin*. As the Court explained

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adjustment before the deadline. The first authority respondents cite was a regional notice suggesting that filing an application for registry under 8 U.S.C. 1259 before the deadline for applying for legalization would be sufficient to toll the legalization deadline. See Legalization Wire # 197, Clerk's Record (LULAC) item 65, Exh. 1. The Assistant Commissioner (Office of Legalization), referred to as "COLEG," promptly countermanded that notice, explaining in an August 8, 1988 wire: "It has been brought to the attention of COLEG that a policy wire has been issued at the regional office level [permitting extension of the deadline based on an application for registry]. At no time, repeat, at no time, has this been the INS' policy." Wire CO 1588-0, App., *infra*, 1a; see also Legalization Wire # 264 (Aug. 11, 1988), App., *infra*, 2a (expressly rescinding Legalization Wire # 197 and stating that "[a]t no time has this been Immigration and Naturalization Service policy.").

The second matter respondents cite (Resp. Br. 37 n.51) is INS's practice of dating applications from the time they were submitted to a QDE. That policy was required by the terms of IRCA, which provided that an applicant could apply not only to the Attorney General, but also to QDEs. See 8 U.S.C. 1255a(c)(1)(B).

Finally, respondents rely (Resp. Br. 38 n.51) on two decisions of the Northern Regional Processing Center. In both cases, the applicants established that they had attempted to file applications before a deadline, but were turned away. See *In re* —, (Northern Regional Processing Facility Mar. 14, 1988) (Am. Immigr. Law. Ass'n reprint No. LO688-189) (alien appeared at office before deadline but was required to make an appointment after deadline); *In re* —-(Northern Regional Processing Facility June 27, 1988) (Am. Immigr. Law. Ass'n reprint No. LO988-347) (alien appeared at office before deadline with multiple applications and a single money order, rather than separate money orders for each application). Consistent with the policy we explained above (see pages 13-14, *supra*), the Legalization Appeals Unit allowed the individuals to seek relief. Respondents have represented to the government that they will lodge copies of those decisions with the Court. Those decisions, of course, are consistent with the government's present position; the applicants in those cases, unlike respondents, "appl[ied]" for relief before the deadline.

there, equitable tolling typically is available in two situations:

> [1] where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [2] where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.

111 S. Ct. at 458. Respondents, of course, did not file pleadings during the application period; if they had, INS would have granted them relief when it receded from the challenged regulations, as it did for the class members who did file timely applications.[20]

Similarly, respondents were not tricked into allowing the deadline to pass by "misconduct"; they simply chose not to challenge the government's duly promulgated view of the requirements for relief. Respondents' reliance (Resp. Br. 38-39) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), to establish misconduct is unsuccessful. As the Court explained in *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), *City of New York* turned on the fact that the challenged policy was "a secret, internal policy." *Id.* at 123. By contrast, the classes in these cases by definition include only individuals who knew about the challenged policies. See Gov't Br. 33 & n.35.[21]

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[20] Respondents miss the point in suggesting (Resp. Br. 39) that it would be unfair to ask for "more diligence" because they filed one of these class actions only "six days after IRCA became law." Although the class actions were filed in the district courts, no members of the classes before the Court filed applications of any kind with INS during the applicable time period.

[21] Because the classes include only respondents who knew about the challenged INS policies, respondents are not in a position to claim (see Resp. Br. 39) that INS violated its statutory obligation to publicize the relief available under IRCA, see 8 U.S.C. 1255a(i). In any event, respondents' real complaint does not seem to be that INS failed to

Even more surprisingly, respondents suggest that the extension is proper because it "is consonant with the legislative scheme." Resp. Br. 37; see *id.* at 47 (relying on "the purpose of the 12-month application period"). Rarely will the Court decide a case in which Congress has made so clear its intent not to allow judicial intervention to extend statutory deadlines. As we have explained, paragraphs (3) and (4) of Section 1255a(f) provide generally for judicial review of INS determinations respecting applications for adjustment. But paragraph (2) imposes a clear and dispositive exception:

> No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

8 U.S.C. 1255a(f)(2). Whatever purposes respondents may attempt to glean from the legislative history, Congress's purpose with respect to the application period is clear from the statute: courts are not to extend the deadline.[22]

---

publicize the requirements for relief; it is that INS publicized *its* view of the requirements rather than respondents' view.

[22] Respondents argue (Resp. Br. 13 n.19) that the Court should not evaluate the propriety of the district court's "alternative" injunction, because the court of appeals did not decide that question and because it was not properly presented in our petition. We disagree. First, in our view, the propriety of the alternative injunction is fairly included in the second question in our petition, which asks whether 8 U.S.C. 1255a "bar[s] the district courts from ordering the Immigration and Naturalization Service to extend [the statutory] deadline." Because there is no basis other than 8 U.S.C. 1255a for the district court's order requiring INS to allow respondents a permanent right to work and reside in the United States, and because that order grants relief to individuals who did not apply before the deadline, we believe the propriety of the order is fairly included in the question presented.

Finally, respondents and their amici suggest that unless the lower courts had the power to extend the statutory deadline, the federal courts are powerless to remedy any wrong caused by INS's challenged regulations. Resp. Br. 34, 43; ACLU Br. 14-20. Not so. It may be that the federal courts are powerless to grant relief to individuals who failed to seek relief, but the courts of appeals were, and are, available to grant relief to individuals who filed timely applications that may have been denied improperly. See, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (overturning an INS decision denying adjustment of status).[23] The inability of the district courts to grant relief is simply a facet of the statute; it does not reflect any deficiency in the general equitable powers of the federal courts.

For the foregoing reasons and those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

We have presented the matter to the Court to offer a full view of the types of relief that the lower courts believe they can enter notwithstanding statutory deadlines. In our view, any resolution of the second question in our favor would be highly likely to require reversal of the alternative injunction as well. In light of the protracted pendency of this litigation, we thought it would be best to give the Court the flexibility to dispose of the matter finally at this time.

[23] Also, to the extent individuals raise a collateral challenge to procedures (like the claimants in *McNary* or claimants in the hypothetical situation in which INS declined to establish a twelve-month application period, posed at Resp. Br. 48 n.61), the individuals would have been able to file an action directly in the district court.

APPENDIX

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PRECEDENCE	SECURITY CLASSIFICATION
U.S. IMMIGRATION & NATURALIZATION SVC.	PRIORITY ACTION INFO	UNCLASSIFIED
ACCOUNTING CLASSIFICATION	**DATE PREPARED**	**FILE**
1581217/81 CE 2211.790	AUGUST 08, 1988	CO 1588-0
FOR INFORMATION CALL		
NAME	**PHONE NUMBER**	**TYPE OF MESSAGE**
TERRANCE M. O'REILLY, COLEG	FTS 633-5309	[X] SINGLE [ ] BOOK [ ] MULTIPLE ADDRESS

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED *(Use double spacing and all capital letters)*

TO:

ROCOMs: ERO, SRO, NRO, WRO; ROLECs: ETO, SRO, NRO, WRO

IT HAS BEEN BROUGHT TO THE ATTENTION OF COLEG THAT A POLICY WIRE HAS BEEN ISSUED AT THE REGIONAL OFFICE LEVEL ADDRESSING THE SUBJECT OF THE REGISTRY APPLICANT'S ABILITY TO FILE FOR LEGALIZATION IF THE REGISTRY APPLICATION WAS FILED PRIOR TO MAY 4, 1988, AND SUBSEQUENTLY DENIED. THE WIRE ALSO STATES THAT THE DATE OF APPLICATION FOR LEGALIZATION WILL BE THE DATE THAT THE APPLICANT FILED FOR REGISTRY.

AT NO TIME, REPEAT, AT NO TIME, HAS THIS BEEN THE INS' POLI[illegible]

IF POLICY WIRES AND/OR MEMOS ADDRESSING THIS SUBJECT HAVE BEEN ERRONEOUSLY ISSUED, THEY SHOULD IMMEDIATELY BE RESCINDED AT THE LEVEL OF ISSUE. A COPY OF THE RESCISSION SHOULD THEN BE TELEFAXED TO COLEG, ATTN: RAYMOND B. PENN, ASSISTANT COMMISSIONER, COLEG, FTS 633-3296.

/S/ Raymond B. Penn
RAYMOND B. PENN
COLEG

ROCOM: BUR, DLS, TWC, SPD
ROLEG: BUR, DLS, TWC, LAGUNA NIGUEL CA

PAGE NO.	NO. OF PGS	SECURITY CLASSIFICATION
1	1	UNCLASSIFIED

STANDARD FORM 14
REVISED 11-80
GSA FPMR (41 CFR) 101-35.306

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PREDENCE	SECURITY CLASSIFICATION
SRO/INS	ACTION PP INFO	UNCLASS
ACCOUNTING CLASSIFICATION	**DATE PREPARED**	**FILE**
158121/7/2211790	8-11-88	LEGALIZATION WIRE # 264
FOR INFORMATION CALL		
NAME	**PHONE NUMBER**	**TYPE OF MESSAGE**
WILLIAM E. ZIMMER REGIONAL LEGALIZATION MANAGER	767-7368	☐ SINGLE ☐ BOOK ☐ MULTIPLE-ADDRESS

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED *(Use double spacing and all capital letters)*

TO:

ALL DISTRICT DIRECTORS
ATTN: ALL DISTRICT LEGALIZATION MANAGERS
ALL LEGALIZATION SITE SUPERVISORS
SOUTHERN REGION

ALL OF REGIONAL, WIRE #197 IS HEREBY RESCINDED. AT NO TIME HAS THIS BEEN IMMIGRATION AND NATURALIZATION SERVICE POLICY. THE INSTRUCTION PERMITTING AN APPLICANT TO CARRY OVER BEYOND MAY 4, 1988, THE DATE OF AN UNSUCCESSFUL APPLICATION FOR REGISTRY IS AND WAS INCORRECT. THEREFORE UNSUCCESSFUL APPLICANTS FOR REGISTRY MAY NOT USE THE FILING DATE OF THIS APPLICATION IN APPLYING FOR ADJUSTMENT UNDER 245(a). PLEASE BE GUIDED ACCORDINGLY.

/S/ William E. Zimmer
WILLIAM E. ZIMMER
REGIONAL LEGALIZATION MANAGER

PAGE NO.	NO. OF PGS	SECURITY CLASSIFICATION
1	1	UNCLASS

STANDARD FORM 14
REVISED 11-80
GSA FPMR (41 CFR) 101-35.306

AMICUS CURIAE

BRIEF

SEP 21 1992
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

WILLIAM P. BARR,
Attorney General of the United States,
Petitioner,

VS.

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
Respondents.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

VS.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICUS CURIAE OF CHURCH WORLD SERVICE, UNITED STATES CATHOLIC CONFERENCE, LUTHERAN IMMIGRATION AND REFUGEE SERVICE AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

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No. 91-1826

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM P. BARR,
Attorney General of the United States,
Petitioner,
vs.
CATHOLIC SOCIAL SERVICES, INC., ET AL.,
Respondents.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
vs.
LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICUS CURIAE OF CHURCH WORLD SERVICE, UNITED STATES CATHOLIC CONFERENCE, LUTHERAN IMMIGRATION AND REFUGEE SERVICE AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Church World Service, United States Catholic Conference, Lutheran Immigration and Refugee Service and American Jewish Committee respectfully submit this brief *amicus curiae* in support of the Respondent class members ("Respondents"). *Amici* urge this Court to affirm the conclusion of the Ninth Circuit that district courts have the equitable authority to extend the time period for Respondents to apply for legalization pursuant to the

Immigration Reform and Control Act of 1986 ("IRCA"). Equitable relief is particularly appropriate in this case because Congress plainly intended in enacting IRCA that Respondents have a meaningful opportunity to apply for legalization. Significantly, persons in the Respondent classes are statutorily eligible for legalization. The *sole* reason Respondents did not timely file their legalization applications is that they were unlawfully prevented from doing so by the Immigration and Naturalization Service ("INS"): either their applications were rejected by INS clerks following instructions issued by the agency's central office, or they were deterred from filing by the INS's outreach and education campaign, which erroneously informed them that they were ineligible.

Amici have extensive experience working with immigrants and refugees residing in this country, including persons in the Respondent classes. *Amici* believe that it would be fundamentally unfair—not to mention contrary to Congressional intent—to reverse the Ninth Circuit and deny Respondents the opportunity to have their legalization applications decided. Approximately 300,000 putative class members have emerged from the "shadow underground" as a result of the stay orders issued by the district courts. They have filed legalization applications and supporting documents with the INS in an attempt to end their clandestine, underground status. They all now possess receipts issued by the INS. As many as 75,000 class members have been issued stays of deportation and employment authorization. Hence, just as Congress intended, Respondents no longer are living in the "shadow underground." Reversal by this Court would revert hundreds of thousands of Respondent class members to "illegal" underground status. Their legalization applications would be destroyed. They would once again face exploitation when working for employers willing to violate the employer sanctions law, they would once again face the prospect of living in substandard housing owned by landlords willing to violate housing codes, and they would once again be fearful to turn to, or cooperate with, law enforcement authorities

when to do so would clearly benefit the community. For all of these reasons and the reasons set forth below, *amici* urge this Court to affirm the decision of the Ninth Circuit.

Church World Service

Church World Service, founded in 1946, is an ecumenical agency of the National Council of the Churches of Christ in the U.S.A. ("NCC"), and works to provide humanitarian and development assistance to persons in need all over the world. The Immigration and Refugee Program ("IRP") is distinct within Church World Service, dealing specifically with refugee and immigration concerns. Refugee resettlement is a major component of IRP, in which national denominations work together ecumenically in resettling refugees with their local congregations in communities across our country. In addition to working with refugees resettling in communities under the United States Refugee Program, IRP also facilitates denominational support of a network of asylum and immigration projects across the country to counsel and assist undocumented immigrants and seekers of asylum and safe haven.

United States Catholic Conference

The United States Catholic Conference (the "Conference") is a non-profit corporation organized under the laws of the District of Columbia. All active Catholic Bishops in the United States are members of the Conference. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, civil rights, the economy, communications, housing and immigration. The Conference has been settling refugees since the 1920's and is presently the single largest refugee resettlement organization in the United States. In collaboration with the Catholic Legal Immigration Network, the Conference resettles and assists in providing legal and social services to thousands of immigrants. The Conference is a frequent participant in INS proceedings in support of the rights of both documented

and undocumented aliens, including refugees and asylum-seekers. The Conference was a Qualified Designated Entity ("QDE") under IRCA and processed over 215,000 applications for legalization.

Lutheran Immigration and Refugee Service

The Lutheran Immigration and Refugee Service ("LIRS") is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS provides a variety of immigration, asylum and refugee-related services. While engaging in service, LIRS has consistently advocated fair and humane treatment for uprooted people. LIRS participated in the legalization program of IRCA as a National Coordinating Agency. LIRS coordinated the efforts of 19 affiliated Qualified Designated Entities ("QDE's") and completed legalization applications for more than 7,300 persons. The QDE's provided counseling to thousands more. Based on its experience with the amnesty program, LIRS believes that equitable relief should be offered to the thousands of people who are statutorily eligible for legalization, yet were excluded from the program.

American Jewish Committee

The American Jewish Committee ("AJC") is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or the descendants of immigrants, if not refugees or the descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. Through the years, therefore, AJC has joined with other *amicus curiae* in numerous cases involving issues before this Court. The case at bar affords AJC an opportunity to do so once again.

SUMMARY OF ARGUMENT

Amici urge this Court to uphold the Ninth Circuit's conclusion that district courts have the authority to grant equitable relief in the form of an extension of the time period for Respondents to apply for legalization. The Respondent classes are comprised of persons statutorily eligible for legalization, but who did not timely apply because they either were erroneously told by the INS that they were ineligible, or they were deterred by the invalid INS regulations from timely filing their applications. The Ninth Circuit correctly determined that to deny equitable relief and foreclose Respondents' legalization applications would be contrary to Congress' directive that IRCA be implemented in a "liberal and generous fashion." Moreover, the equitable relief fashioned by the district courts below effectuates, rather than frustrates, the Congressional intent in enacting IRCA because Respondents were unlawfully excluded by the INS from participation in the legalization program; thus, a brief extension best ensures that all *eligible* persons have a meaningful opportunity to apply for legalization and attain documented status. Reversal not only would dramatically increase the undocumented population Congress sought to decrease in enacting IRCA, it would have a devastating impact on the already-injured class members, some of whom would face deportation, involuntary separation from their families, and the loss of all they have achieved in over a decade of life in this country.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE NINTH CIRCUIT'S CONCLUSION THAT DISTRICT COURTS HAVE THE EQUITABLE AUTHORITY TO EXTEND THE TIME PERIOD FOR RESPONDENTS TO APPLY FOR LEGALIZATION.

The Ninth Circuit properly concluded that the equitable remedy provided by the district courts—a brief

extension of the time period for Respondents to file their legalization applications—is appropriate and consistent with the Congressional intent in enacting IRCA. IMMIGRATION REFORM AND CONTROL ACT OF 1986, PUB. L. NO. 99-603, 100 STAT. 3359 (1986). As the Ninth Circuit stated in its opinion affirming the actions of the district court below:

> "*Congress clearly intended for illegal aliens to have ample and meaningful opportunities to apply for adjustments of status*. The members of the plaintiff class did not have such opportunities because the INS's interpretation of the 'brief, casual and innocent' provision was not invalidated until the Attorney General's deadline had almost expired." (*Catholic Social Servs., Inc. v. Thornburgh*, 956 F.2d 914, 922 (9th Cir. 1992), *cert. granted*, 112 S. Ct. 2990 (1992) (emphasis added))

Moreover, as *amici* demonstrate *infra*, in addition to ensuring an ample time period for Respondents to apply for an adjustment of their status, Congress intended that legalization eliminate as much as possible of the unregulated "shadow underground" in which all or many undocumented persons exist in this country.[1] *Amici* contend that

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[1]This Court recognized the vulnerable plight of those living in the "shadow underground" well before the enactment of IRCA:

> "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants - numbering in the millions - within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass

(continued...)

foreclosure of Respondents' legalization applications would inevitably and unfairly banish these people back to the "shadow underground" Congress sought to eliminate. *See* Part B, *infra*. *Amici* further contend that Congress also recognized that to subject potentially tens of thousands of persons—such as Respondents and their families—to the hardship of deportation would be costly, ineffective and morally unacceptable. *See* Part C, *infra*.

In brief, *amici* submit that the equitable relief fashioned by the district courts both effectuates Congressional intent and remedies the injustice wrought upon Respondents by virtue of the admitted misinterpretation and misimplementation of IRCA by the INS.

A. The Ninth Circuit Correctly Determined That It Would Be Contrary To Congressional Intent To Foreclose Respondents' Applications For Legalization.

Without question, Congress intended that the legalization program be implemented by the INS in a "liberal and generous fashion." H.R. REP. No. 99-682(I), 99th Cong., 2d Sess. 72 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5676 (hereinafter "H.R. REP. 99-682").[2] To maximize the participation of eligible legalization candidates, Congress directed the Attorney General to "broadly disseminate information respecting the benefits which aliens may receive

---

[1](...continued)

> presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." (*Plyler v. Doe*, 457 U.S. 202, 218-19 (1982))

See also McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888, 890 (1991) ("[IRCA] constituted a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States.")

[2]Further citations to the Report will indicate specific page numbers to the Report itself as well as to the parallel reprint in U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS ("U.S.C.C.A.N.").

[by legalization] and the requirements to obtain such benefits." 8 U.S.C. §1255a(i). To ensure that this information would reach the targeted persons well in advance of the commencement of the 12-month legalization application period, Congress decided that the application period would not commence immediately upon enactment of IRCA, but rather six months after enactment. *Id.* at §1255a(a)(1)(A). In recognition of the historically adversarial and distrustful relationship between undocumented immigrants and the INS,[3] Congress further provided that the INS was to contract with and fund the efforts of "Qualified Designated Entities" ("QDEs")—primarily churches and social service agencies—to provide preliminary eligibility screening for potential legalization applicants. *See* 8 U.S.C.

[3]This Court recently acknowledged the historically adverse relationship between the INS and illegal immigrants in the context of the legalization provisions applicable to Special Agricultural Workers:

> "In recognition that the fear of prosecution or deportation would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status, the Reform Act directed the Attorney General to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process." (*McNary*, 111 S. Ct. at 892)

Indeed, upon enactment of IRCA, INS representatives admitted publicly to difficulty adjusting to their "change of hats":

> "'It's a complete departure for me,' said Dona L. Coultice, until recently a deputy assistant regional commissioner handling detention and deportation of illegal aliens. Now she is deputy head of the region's new legalization office, obliged to find ways to quickly process the applications of several hundred thousand aliens expected to seek legal resident status under the law's amnesty provisions. 'It's like a 180-degree turn because now I'm working to keep people in as opposed to locking them up or sending them away.'" (Mathews, *Awaiting A Deluge At The INS; Agency Prepares For Law's Advent*, WASH. POST, March 10, 1987, at A13.)

§1255a(c)(1)-(3). Congress hoped that the availability of the QDEs would "encourage participation among undocumented aliens who fear coming forward" before the INS. H.R. REP. 99-682 at 73, 5677.

The Ninth Circuit upheld the principle of maximizing participation in the legalization program when it reasoned that:

> "Congress intended for aliens to have a twelve-month period in which to apply for legalization and specified that the legalization program be implemented in a liberal and generous fashion. *The INS's erroneous interpretation of the Act in reality deprived the aliens of the full twelve-month application period Congress had provided for them.* It would be contrary to congressional intent to foreclose these aliens' applications." (*Catholic Social Servs.*, 956 F.2d at 922)(emphasis added)[4]

In addition to maximizing participation in the legalization program, the legislative history reveals that Congress had at least two additional issues in mind when it drafted the legalization provisions of IRCA: specifically, Congress hoped to eliminate the "shadow underground" in which so many immigrants have lived for so many years (and thereby free the INS to refocus its enforcement activities along the United States borders and halt new flows of undocumented migrants), and to avoid the devastating prospect of deporting

[4]The Ninth Circuit's sentiment of fairness toward Respondents—that they should not be unjustly (and irrevocably) penalized by the INS's promulgation of illegal regulations—echoes previous decisions involving undocumented persons. *See Villena v. INS*, 622 F.2d 1352, 1360 (9th Cir. 1980) (suspension of deportation proceeding: "Villena should not be penalized because of an unjustified INS delay in responding to his petition within a reasonable period of time . . . or because of the INS' failure to effect his deportation.").

people away from their families and lives in the United States. Given the significance of this legislative history to the Court's decision in this case, we quote extensively from the House and Senate Committee Report accompanying IRCA (and specifically discussing the legalization program):

> "The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. *However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.*
>
> "Continuing to ignore this situation is harmful to both the United States and the aliens themselves. *However, the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage.*
>
> "The Committee believes that the solution lies in legalizing the statuts [sic] of aliens who have been present in the United States for several years, recognizing that past failures to enforces [sic] the immigration laws have allowed them to enter and to settle here.

> "This step would enable INS to target its enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States. It would allow qualified aliens to contribute openly to society and *it would help to prevent the exploitation of this vulnerable population in the work place.*
>
> "The Committee strongly believes that a one-time legalization program is a necessary part of an effective enforcement program and that a *generous* program is an essential part of any immigration reform legislation." (H.R. REP. 99-682 at 49, 5653) (emphasis added) (quoted in *McNary v. Haitian Refugee Center, supra*, 111 S. Ct. at 891 n.4)

Hence, the district courts' well-crafted equitable relief effectuates, rather than frustrates, the public policies established by Congress in passing IRCA. It is plain that in 1986 Congress was "well aware that there were large numbers of potential IRCA applicants." Kanstroom, *Judicial Review Of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 HARV. C.R.-C.L. L. REV. 53, 66 (1990). Indeed, it was the *explicit intent* of Congress to lift these persons out of their unregulated and vulnerable status by granting them a chance at legalization. *McNary*, 111 S. Ct. at 891. Moreover, Congress recognized that because thousands of undocumented immigrants have substantial familial and community ties to the United States, deportation would result in unacceptable hardship and despair.[5]

---

[5]For Respondents, these ties have been forged by more than 10 years presence in the United States during which they have become extensively integrated into their communities. More than one observer has suggested

(continued...)

131 CONG. REC. S11260 (Sept. 11, 1985) and *id.* S11613 (Sept. 17, 1985)(remarks of Sen. Simpson (R-WY), Senate Floor Manager of IRCA) ("We are really not doing much deporting of illegal undocumented persons who have United States citizen children. We do not do that. We are not that kind of country . . . . We do not like to do those things.")).

Significantly, Congress foresaw that the INS's role in implementing IRCA would be crucial to properly effectuate Congressional intent. The House and Senate Report warns that:

> "[u]nnecessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort. *Therefore, the Committee expects the INS to incorporate flexibility into the standards for legalization eligibility.*" (H.R. REP. 99-682 at 73, 5677)

See also Lichtman, *Individual Rights Under IRCA, Title VII, and Other Authorities*, 3 LAB. LAW. 729 (1987) ("the actual value of IRCA will be much affected by how the INS and the Justice Department implement restrictive regulations and the extent to which they are upheld by the courts."). Congress

---

[5](...continued)
that this integration, or "contacts" with this country, should be legally recognized and protected. *See* Note, *The Procedural Due Process Rights Of Legalization Applicants Under The Immigration Reform and Control Act of 1986: These Are The Procedures That Try Men's Souls*, 39 SYRACUSE L. REV. 1381, 1399 (1988) ("Inherent in IRCA is the proposition that the intangible links between aliens in the United States illegally and their social and economic communities should be given legal recognition."). *See also* Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WISC. L. REV. 955, 983 (1988)("The law's protection and recognition of undocumented immigrants in certain contexts demonstrates that these immigrants have a legal identity distinct from that of alien. . . . This identity derives from their personhood and their territorial presence, and it demarcates a certain sphere of formally protected activity accorded to the acknowledged community members.")

therefore must have contemplated that the INS would promulgate regulations *consistent with* the generous spirit pervading IRCA. The INS's failure to do so—indeed, its promulgation of restrictive regulations directly *in conflict with* the spirit of IRCA—surely cannot be condoned. Otherwise, Respondents, whom Congress clearly intended to have the opportunity to apply for legalization, will be forever and unfairly foreclosed from doing so. The resulting implications are unacceptable: Respondents will be forced back into the unregulated shadows of our society and subject to the constant threat of deportation and separation from their families and the lives they have so laboriously built in this country.

B. Reversal By This Court Effectively Would Banish Hundreds Of Thousands Of Persons Unable Or Unwilling To Leave This Country Back To The Unregulated "Shadow Underground" That Congress Sought To Eliminate.

Amici urge this Court to consider the inevitable impact of a reversal in this case: briefly stated, approximately 300,000 class members will return to the "shadow underground" of this country from whence they emerged when, under the district courts' stay orders, they applied for legalization.

> "[M]ost of the undocumented workers excluded by the [legalization] process will remain in the United States. The result of this situation has been the creation and growth of a 'class of exploitable, clandestine and unorganized cheap labor for unscrupulous employers in the U.S.' . . . who take advantage of the unlawful alien's fear of deportation. The abuses may range from imposing longer work weeks to refusing to pay the worker for months of work." (Note, *The Discriminatory Impact*

Of the Immigration Reform and Control Act of 1986, 10 CHICANO L. REV. 14, 24-25 (1990))

See also Falkenthal, *The Adequacy Of Review For Aliens Denied Legalization Under The Immigration Reform And Control Act Of 1986: A Due Process Analysis*, 26 CAL. W. L. REV. 149 (1989-1990) ("Immigration experts estimate that most aliens who did not qualify for amnesty will stay in the United States, and will continue to be vulnerable to exploitation."). In an October 1989 report to Congress concerning immigration control efforts of the United States government, the Government Accounting Office ("GAO") admitted that there is no assurance that undocumented persons ordered to surrender for deportation actually do so.[6] Worse yet, over time this vulnerable population will grow, continuing to evade the law, to endure illegal and dangerous work conditions, to fail to report crimes that they suffer, to pay off landlords to avoid eviction and to delay seeking desperately needed medical treatment. Surely this tragic result cannot have been intended by Congress when it drafted IRCA and directed that it be implemented in "a liberal and generous fashion." H.R. REP. 99-682 at 72, 5676.

To the contrary, when it passed IRCA Congress knew that exploitation and victimization of illegal aliens was occurring within our borders and explicitly sought to eliminate it. Merino, *Compromising Immigration Reform: The Creation Of A Vulnerable Subclass*, 98 YALE L.J. 409, 415 (1988) ("Members of Congress realized that the existence of a shadow population and a subterranean economy is harmful to both legal workers and aliens unlawfully present in the

[6]*See* GAO, Report to the Chairman, Subcommittee on Immigration, Refugees and International Law, Committee on the Judiciary, House of Representatives, *Immigration Control: Deporting and Excluding Aliens From The United States* (October 1989). In this report, the GAO notes that "a 1984 nationwide INS study found that 76 percent of aliens ordered to surrender for deportation failed to do so." *Id.* at 49-50.

United States"). Similarly, the Select Commission on Immigration and Refugee Policy:

> "also recognized that undocumented aliens in the United States are vulnerable to exploitation, and employer sanctions could make them even more vulnerable. Illegal aliens in the United States live in constant fear of deportation. This fear forces aliens to live as fugitives, and makes aliens easily exploitable. Aliens are primarily employed where the wages are lowest and working conditions are the worst, in agriculture and small nonunion businesses. Despite the low pay and inhumane treatment imposed on aliens, they are unwilling to report violations of wage, hour and safety laws, because any contact with authorities can lead to deportation. Many aliens live in poverty due to their low wages. They are often unwilling to contact police when they are the victim of crimes. They are even reluctant to seek medical care for fear of deportation." (Falkenthal, *Adequacy of Review* at 158).[7]

As a result, legalization was seen by Congress as the only vehicle by which undocumented persons could rise out of

[7]*Accord*, Note, *A Human Rights Approach To The Labor Rights Of Undocumented Workers*, 74 CAL. L. REV. 1715 (1986) ("[Illegal immigrants are] disproportionately paid substandard wages, penalized for participating in union activities, and subjected to abysmal working-place environments."); Portes & Kincaid, *Alternative Outcomes Of Reform*, 22 SOCIETY no. 4 73, 76 ("Undocumented workers are usually subject to highly exploitative, unhealthy and degrading working conditions which they are virtually powerless to alter."); Corchado & Solis, *Immigration Law Creates A Subclass of Illegals Bound To Their Bosses and Vulnerable To Abuses*, WALL ST. J., September 2, 1987 (describing reports of employers seizing their new advantage by "cutting illegals' wages, forcing them to work without overtime and even physically abusing them.").

the exploited underclass in which they live and the United States could regain control of its borders. H.R. REP. 99-682 at 49, 5653.

In addition to those who will return to the shadows, there will be those who will voluntarily deport if apprehended, but who will soon thereafter attempt to return to the lives they established in the United States. As mentioned above, in enacting IRCA Congress paid heed to the familial, social and economic bonds that long-term resident undocumented persons develop with this country and that strongly pull them back here. *See* Part A, *supra* (quoting H.R. REP. 99-682 at 49, 5653).[8] Congress therefore implicitly acknowledged that which immigration experts have long recognized: the impetus to immigrate is largely a

[8]In addition, immigration experts have identified factors in the home countries that push people to immigrate to the U.S. "For most aliens, returning to their home countries is not a viable option, because it means returning to even greater poverty and oppression." Falkenthal, *The Adequacy of Review For Aliens Denied Legalization Under the Immigration Reform and Control Act of 1986: A Due Process Analysis*, 26 CAL. W. L. REV. 149 (1989-90). Or, as stated more explicitly by Peter Schuck in *Overview: Domestic Implications Of Immigration Policy*, 7 YALE L. & POL'Y REV. 1 (1989):

> "Clearly, the conditions propelling people toward the United States have never been stronger. Population pressures in the Third World, most notably in nearby Latin America, are building rapidly. The labor force in Latin America alone will grow by more than 90 million workers between the years 1980 and 2000. This increase of 77% will make it virtually impossible to maintain even the dismal current levels of employment prevailing there." (*Id.* at 4)

Even the GAO acknowledges that immigration cannot be completely deterred by legislation in light of conditions in other countries. *See* GAO, Briefing Report to Congressional Requesters, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (March 1988) at 9 ("Given increasing 'push' factors in many traditional sending countries (for example, due to worsening economic conditions), illegal immigration is likely to continue [after IRCA], though probably at a lower rate.")

function of the supply and demand functions of the international labor market, which explains why non-economic deterrent methods do not work to halt illegal entry to this country.[9] *See* Note, *A Human Rights Approach To The Labor Rights Of Undocumented Workers*, 74 CAL. L. REV. 1715, 1718 (1986) ("Decisions to migrate result from highly coercive political, social and economic forces."). In short, it is very difficult to completely "seal" the borders of the United States.[10]

Because Congress explicitly sought in enacting IRCA to eliminate the "shadow underground" and to enable

[9]One commentator theorizes that the level of border enforcement is explained at least in part by the desire of organized interest groups to influence domestic wages:

> "Based on data covering the years 1900 through 1982, immigration policy enforcement was indeed found to be countercyclical, becoming more restrictive during economic downturns and easing during economic expansions." (Shughart, Tollison & Kimenyi, *The Political Economy of Immigration Restrictions*, 4 YALE J. ON REG. 79, 81 (1986))

Indeed, Congress's enactment of employer sanctions incident to IRCA represents a fundamental change in legislative policy—away from thinking of controlling immigration as a law enforcement issue and towards thinking of controlling immigration as an economic issue. The employer sanctions provision prohibits employers from hiring, recruiting, or referring for a fee immigrants known to be unauthorized to work in the United States. Employers violating this provision are subject to a series of civil fines, or criminal penalties when there is a pattern or practice of violations. *See* INS, *Statistical Yearbook of The Immigration and Naturalization Service, 1987*, at xv.

[10]In addition to immigrants' sheer determination to overcome barriers to entering the United States, there is a purely geographic happenstance facilitating their attempts. *See* Nichols, *The United States Immigration Reform And Control Act of 1986: A Critical Perspective*, 8 NW. J. INT'L L. & BUS. 503 (1987). Specifically, Ms. Nichols notes that the primary reason the INS cannot seal the United States' southern border is because of its physical length. "While most countries have immigration controls at their borders, they do not share a 2,000 mile permeable southern border with the country from which most undocumented aliens come." *Id.* at 521.

certain immigrants—*including* Respondents—to apply for legalization, the Ninth Circuit properly concluded that the equitable relief fashioned by the distinct courts was appropriate and consistent with that congressional intent.

C. Reversal By This Court Would Condemn Respondents And Their Families To The Constant Threat And Recognized Hardship Of Deportation.

Although the vast majority of class members is likely to return to the shadows if this Court should reverse the Ninth Circuit, the threatened hardship of deportation would remain. *Amici* contend that it is fundamentally unfair to allow those that Congress intended be granted amnesty to be subjected to the hardship of deportation, or the constant threat of deportation, through no fault of their own. Hence, *amici* urge this Court to reaffirm its historically compassionate approach towards persons potentially facing the devastating prospect of deportation from this country. After all, this Court has labelled deportation "a drastic sanction, one which can destroy lives and disrupt families" (*Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963)); an event that may result in loss "of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)); and the equivalent of "banishment or exile" (*Fung Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).[11] Because of the enormity of deportation, this Court has followed the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In the context of suspension of deportation cases filed pursuant to 8 U.S.C. Section 1254(a), federal courts have shown their willingness to approve relief for undocumented immigrants who have established significant ties with the United States and can demonstrate that their

[11] *See* authorities in Note, *Judicial Review Of "Extreme Hardship" In Suspension Of Deportation Cases*, 34 AM. U. L. REV. 175 (1984).

deportation would result in "extreme hardship" to themselves or to family members lawfully residing in the United States.[12] The factors typically considered to determine whether such hardships exist in a particular case include: (1) the applicant's family ties in the United States and abroad; (2) the age and health of the applicant (and his or her family); (3) the applicant's length of residence in the United States; (4) the condition, both economic and political, in the applicant's home country; (5) the financial status of the applicant; (6) the possibility of other means of adjustment of status; and (7) the applicant's immigration history. *Ramos v. INS*, 695 F.2d 181, 189 n.20 (5th Cir. 1983) (citing factors considered by the BIA). The circuit courts have indicated that the single most important hardship factor may be the contemplated separation of the applicant from his or her family living in the United States. *E.g.*, *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981), *cited with approval in Antoine-Dorcelli v. INS*, 703 F.2d 19, 21 (1st Cir. 1983).

Recent decisions of the circuit courts concerning suspension of deportation proceedings plainly reflect the Congressional concern for the deleterious effect deportation may have on the applicant and his or her family members. For example, in *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987), the petitioners were a married couple who had been living in the United States since 1975 with their children, three of whom were United States citizens. *Id.* at 1421. All

[12] Of course, the INA commits the definition of "extreme hardship" in the first instance to the executive branch, i.e., to the Attorney General and his delegates. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The Board of Immigration Appeals (hereinafter "BIA") is the agency responsible for final administrative review of suspension decisions; the BIA is a creation of the Attorney General and exists without statutory authority. *See* 8 C.F.R. §3.1 (1984) (discussing BIA's functions). "By reviewing the procedures by which the BIA reaches its deportation decisions, however, the [federal] courts continue to correct the injustice inherent in the application of the antiquated BIA concept of extreme hardship." Note, *Judicial Review of "Extreme Hardship" In Suspension Of Deportation Cases*, 34 AM. U. L. REV. 175, 177 (1984).

of the children spoke English as their primary language and were enrolled in public school. *Id.* In reversing and remanding the case to the BIA for consideration of the possibility of hardship from family separation, the court stated:

> "The importance and centrality of the family in American life is firmly established both in our traditions and in our jurisprudence. The Supreme Court has said, "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because it is deeply rooted in the Nation's history and tradition." (*Id.* at 1423 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977))

The court found that the BIA in assessing the potential for "extreme hardship" should evaluate not only the potential hardship to the petitioners themselves, but also to the individual family members—particularly the hardship that would be incurred by citizen children whose parents face deportation.[13]

The circuit courts do not hesitate to remand a particular case to the BIA for further reconsideration if it is concluded that the BIA (or INS) did not properly evaluate family issues in its analysis of "extreme hardship." In *Luna v. INS*, 709 F.2d 126 (1st Cir. 1983), the court chided the BIA for making a determination of no extreme hardship without even conducting a hearing:

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[13]*See id.* at 1424-25 (noting that "other circuits have recognized the principle that separation may be a crucial factor in determining extreme hardship" and citing *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983) and *Bastidas v. INS*, 609 F.2d 101 (3d Cir. 1979)); *see also Jara-Navarrete v. INS*, 813 F.2d 1340, 1342 (9th Cir. 1986) ("In reviewing BIA decisions involving hardship to United States children, generalized rather than individualized consideration, and cursory treatment of individual circumstances, constitute an abuse of discretion."); Statement of Sen. Simpson, *supra* at 12.

> "How does the Board know what attachments the children have formed after living in the United States for four years, from ages 12 to 16, 10 to 14, 8 to 12, and 7 to 11? And, without a hearing, how can it dismiss so easily the fairly serious claims about Luna's wife's illness? Moreover, what of a factor the Board does not mention—the nonmedical hardship to *Mrs.* Luna. She, a lawful resident, apparently must choose between staying with one or both of her parents in the United States and leaving with her husband." (*Id.* at 128)

See Saldana v. INS, 762 F.2d 824, 828 (9th Cir. 1985) (reversing and remanding decision of the BIA: "[t]he BIA gave no recognition to the trauma Saldana's wife, child and step-children would experience if the INS deported their alleged source of emotional and economic security. . ."); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (reversing and remanding to the BIA for consideration of hardship to petitioner's family).[14]

The potential for Respondents to suffer extraordinary hardship should they be separated from their

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[14]*See also Ramos*, 695 F.2d at 186 (prolonged and extensive geographic separation or removal of children from their parents "normally must be considered by the INS in its determination of whether 'extreme hardship' has been shown"); *Ravancbo v. INS*, 658 F.2d 169, 174 n.6 (9th Cir. 1981) (citing H.R. REP. No. 1199, 85th Cong., 1st Sess. 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020 for congressional intent "to provide for the liberal treatment of children" in the immigration context); *Villena v. INS*, 622 F.2d 1352, 1359 (9th Cir. 1980) ("the Board must consider what effect the deportation will have on the citizen child and whether the child will suffer extreme hardship"). *See* Guendelsberger, *Implementing Family Unification Rights In American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253 (1988) (arguing that a constitutional right to family unification of the nuclear family should be recognized and implemented in immigration law).

families cannot reasonably be disputed.[15] As the following excerpts from the Joint Appendix demonstrate, many—if not most—of Respondents have children who are United States citizens and/or live with family members who have or are eligible for legal status in this country. Many persons in the Respondent classes have resided in the United States and have been productively employed for more than 20 years.

> "I entered the United States in 1970 without inspection at San Ysidro, California, and have, since that date, resided unlawfully in this country. I live[] with my wife and two United States children, ages 9 and 11, in Parlier, California. I am employed in agricultural work and support my wife and children. . . . The expulsion of my wife and myself would cause severe hardship to ourselves and our children. . . . We would be forced to either move our children to Mexico, where educational opportunities and health services are barely available, or leave our children behind to be placed in a foster home in the United States." (Joint App. at 160-162 (Declaration of Onesimo Nunez-Sanchez))

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[15]Ironically, while the INS evidently believes IRCA cannot be interpreted to alleviate family hardship in this case, the INS in 1990 decided that IRCA provided it the authority to administratively implement its "Family Fairness" program. This program granted permission to spouses and unmarried children of legalization applicants to stay in the United States if they were in this country before November 1, 1986. *See* Meckel, *Amnesty Policy Change "Wonderful" for Families*, HOUSTON POST, Feb. 3, 1990, at A1 (Statement of INS Commissioner Gene McNary: "To split families simply encourages further violation of the law as they (illegal aliens) attempt to reunite.") It is virtually certain that Respondents and their families will undergo the same hardship and dislocation the INS recognized and resolved to avoid just two years ago if this Court reverses the Ninth Circuit and denies Respondents the opportunity to have their legalization applications decided.

> "I live with my husband, Roberto Marquez, and my two daughters, who are U.S. citizens. The oldest daughter, Ebelia Maria Marquez, is 8 years old and the younger daughter, Mariela Marquez, is 6. Both were born at Stanford, California. . . . If I am not permitted to legalize, it would be a great tragedy for my whole family. My husband is eligible for amnesty and is applying. My daughters are U.S. citizens. But if I am deported, the whole family would have to leave this country and live in Mexico. The girls are in school here, and are learning very well, completely in English. The school in San Nicolas, where my parents live, is not very good, unlike the schools here, and there is no secondary school. You have to pay a lot to go to school after the sixth grade in another town, and it's likely that we would not be able to pay what is required. . . . Here in East Palo Alto, we live in a house which we are buying. . . Life would be very hard for me and for my family if we have to leave our home here and go to Mexico." (*Id.* at 164-66 (Declaration of Eduvijes Marquez))

Indeed, given the demonstrated potential for family hardship, if this Court reverses the Ninth Circuit and forecloses Respondents' opportunity to have their legalization applications decided, *amici* predict that tens of thousands of class members will challenge any deportation orders by filing applications for suspension of deportation under 8 U.S.C. Section 1254. The immediate result would be to overwhelm both INS administrative adjudication and review machinery, not to speak of the effect on a federal judiciary already severely backlogged with cases. Because Congress plainly did not intend in enacting IRCA to *increase* the number of persons subject to deportation, nor to tear Respondents from

the security of their families, *amici* urge this Court to affirm the district courts' grant of equitable relief.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Ninth Circuit's conclusion that district courts have the equitable authority to extend the time period for Respondents to apply for legalization under IRCA.

DATED: September 21, 1992.

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

—v.—

CATHOLIC SOCIAL SERVICES, INC., *et al.*,
Respondents.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

—v.—

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of almost 300,000 members dedicated to protecting civil rights and civil liberties. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and laws apply equally to all persons, including those who are not citizens of the United States. In particular, the ACLU, through its Immigrants' Rights Project, has advocated for a fair and comprehensive legalization program under the Immigration Reform and Control Act of 1986 ("IRCA") to fully implement the intent of Congress and the requirements of the law.

The American Immigration Lawyers Association ("AILA") is a national bar association of lawyers and law school professors who specialize in immigration and nationality law, and the associated American Immigration Law Foundation ("AILF") is an immigration bar foundation whose Legal Action Center engages in nonprofit litigation and advocacy. AILA and AILF Legal Action Center seek to foster the just administration of immigration law, to advance the quality of practice in the field, and to secure the fair interpretation of immigration legislation.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

INTRODUCTION

This case concerns the power of the district courts to address and to remedy the Immigration and Naturalization Service's ("INS") unlawful implementation of the 1986 "amnesty" program created by IRCA to provide undocumented aliens with legalized status. The instant brief addresses the question of whether IRCA deprived the federal courts of their traditional equitable power to toll the Act's 12-month filing period in order to remedy unlawful INS actions that prevented thousands of eligible applicants from applying for legalization. As shown below, the district courts' remedial orders are consistent with the decisions of this Court as well as with the time-honored principles of equity jurisprudence in Anglo-American Law.[2]

STATEMENT OF THE CASE

In 1986 Congress enacted the Immigration Reform and Control Act. Among other things, IRCA created an "amnesty" program that allowed certain undocumented aliens to apply first for lawful temporary residence and then for permanent residence status. *See generally* 8 U.S.C. §1255a. The Act required that the Attorney General designate a 12-month application period and that aliens apply during that period. 8 U.S.C. §1255a(a)(1)(A). Reflecting Congress' intent to confer legal status on all eligible applicants, IRCA further directed that the Attorney General "shall" legalize all aliens who meet the eligibility standards. 8 U.S.C. §1255a(a).

These two consolidated cases involve class action challenges to two INS provisions implementing the eligibility requirements of IRCA's amnesty program.[3] In both cases the district courts found that the INS policies were inconsistent with the statute and caused eligible aliens to be deprived of the opportunity to obtain legalization. On appeal, the INS did not challenge the district courts' determinations that the policies were unlawful. *See Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914, 916 (9th Cir. 1992)(consolidating both cases).

In the first case, *CSS v. Barr*, Catholic Social Services ("CSS") and a class of aliens filed suit immediately after IRCA was enacted challenging INS' restrictive interpretation of the "brief, casual and innocent" provision as set forth first, in a 1986 INS telex and, later, in a May 1, 1987 final regulation. *See* 8 C.F.R. §245a.1(g). After rebuffing defendants' motions and obtaining discovery, plaintiffs filed for summary judgment in November 1987. On April 22, 1988 -- almost twelve months after the May 1, 1987 regulation went into effect, but only twelve *days* before the end of the application period -- the district court ruled that the INS regulation was illegal. In order to provide meaningful relief, the court extended the application period for class members for approximately six

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[2] *Amici* address only the remedial issue because the jurisdictional issue is treated extensively by the parties and *amicus curiae* American Bar Association.

[3] The statutory requirements for eligibility include that the alien have "resided continuously . . . in an unlawful status" in the United States since January 1, 1982, 8 U.S.C. §1255a(a)(2)(A), and have maintained "continuous physical presence" in this country since November 6, 1986. 8 U.S.C. §1255a(a)(3)(A). The "physical presence" requirement was modified by the statutory provision that "brief, casual, and innocent absences" did not constitute an interruption of physical presence. 8 U.S.C. §1255a(a)(3)(B).

On May 1, 1987, the Attorney General promulgated regulations designating May 5, 1987 to May 4, 1988 as the application period. INS also adopted a regulation severely restricting the "brief, casual and innocent" exception to the physical presence requirement, *see* 8 C.F.R. §§245a.2(a); 245a.1(g), as well as one providing that an alien would be deemed not to have maintained continuous "unlawful residence" if he or she entered the United States during the relevant period using a fraudulent visa or fraudulent INS document. 8 C.F.R. §245a.2(b)(8).

months until November 30, 1988.[4] Although the unlawful regulation was in effect for almost the entire 12-month application period, the extension ordered by the district court was for only half of that time.

In the second case, *LULAC v. INS*, the League of United Latin American Citizens ("LULAC") and a class of aliens filed suit in July 1987, two months after the application period began, challenging the regulation denying eligibility to "fraudulent re-entry" applicants. INS withdrew the challenged regulation in October 1987, and the district court subsequently declared it unlawful in July 1988. In August 1988, the *LULAC* court ordered the application period extended for approximately three months until November 30, 1988 for eligible class members -- again a period shorter than the time that the unlawful regulation was in effect. 956 F.2d at 918-19.

In both cases, as a result of the illegal regulations and INS' administration of those regulations, eligible applicants were prohibited or deterred from submitting applications. Specifically, thousands of applicants attempted to apply but were told by the INS not to submit applications. Other applicants, aware they were ineligible under INS' restrictive policies, were deterred from pursuing legalization.[5] Based on these findings, the *CSS* and *LULAC* courts tolled the 12-month application period for six and three months respectively to afford a meaningful application period to class members who would have applied but for the offending regulations. These limited extensions carefully reflected the number of months that the illegal regulations were in effect.

[4] The November 30, 1988 date is significant because it was the deadline for applications for the separate "SAW" amnesty program created by IRCA to provide legalized status for "special agricultural workers." *See* 8 U.S.C. §1160(a)(1)(A); 8 C.F.R. §210.2(c). Thus, even without the district court's order, INS had to maintain a legalization application process until the end of November 1988.

[5] The INS was under an affirmative duty to publicize the requirements for legalization. 8 U.S.C. §1255a(i). In carrying out that mandate, the agency publicized the restrictive eligibility requirements that the district courts subsequently declared invalid.

SUMMARY OF ARGUMENT

The federal courts possess the power to order equitable relief in order to effectuate the intent of Congress. In *Irwin v. Veterans Administration*, __ U.S. __, 111 S.Ct. 453 (1991), this Court recognized that the equitable tolling of statutory time limits is presumptively consistent with congressional intent. That is particularly true here. Congress intended eligible undocumented aliens to have a full 12-month period to apply for legalized status. As a result of the INS' unlawful implementation of the program, the application period was severely restricted if not effectively eliminated for thousands of eligible applicants. In response, the district courts properly ordered the application period tolled for a limited duration to provide applicants with the full application period that Congress intended.

The history of the judiciary's equitable authority further confirms that the relief ordered in this case is consistent with the courts' power to fashion a meaningful remedy. Equity has always been premised on the recognition that the legislature can neither anticipate every violation of law, nor specify every type of relief. Historically, therefore, it has been necessary for the courts to impose case-specific relief to ensure that legislative will is not frustrated by unanticipated or unauthorized events. This historical practice began under Greek and Roman law, was later refined by the English Chancery, and is now firmly embedded in our system of jurisprudence.

ARGUMENT

I. TOLLING IRCA'S 12-MONTH FILING PERIOD IS CONSISTENT WITH THE DECISIONS OF THIS COURT

The First Judiciary Act vested the federal courts with a body of equitable remedies, procedures and practices developed in the English Court of Chancery. *See* L. Friedman, A HISTORY OF AMERICAN LAW 21, 130 (1973). Since that time the federal courts have consistently utilized their broad authority to fashion equitable relief to effectuate congressional intent. *See Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970); *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288 (1960); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939). Indeed, the power "to mould each decree to the necessities of the particular case," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)(citations omitted), is an indispensable complement to legislative enactment, which cannot provide for every contingency.

In fashioning equitable remedies, federal courts may of course not "disregard statutory and constitutional requirements." *INS v. Pangilinan*, 486 U.S. 875, 883 (1988). Rather, their task is to determine what relief is necessary to insure that such requirements are satisfied. At times strict adherence to the literal import of a provision may be the proper means of doing so. *See, e.g., Pangilinan*. In other cases, such unbending literalism in the face of events, unanticipated and unauthorized by Congress, will undermine legislative intent. Ultimately, then, "the proper test is . . . whether [equitable relief] in a given context is consonant with the legislative scheme." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 557-58 (1974). *See Bowen v. City of New York*, 476 U.S. 467, 480 (1986)(test is "whether equitable tolling is consistent with Congress' intent").

The tolling of statutory time limits is one of the

equitable remedies traditionally employed by federal courts to effectuate congressional intent. Two terms ago this Court resolved all doubt regarding its earlier cases and held that, despite the sovereign immunity concerns raised by suits against the government, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Veterans Administration*, 111 S.Ct. at 457. "Such a principle," the Court stated, "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. Congress, of course, may provide otherwise if it wishes to do so." *Id.* Thus, after *Irwin*, where the government argues against the tolling of a statutory time period, it bears the burden of showing that Congress, contrary to its normal practice, intended to strip the federal courts of their equitable authority.

Here, as in *Irwin*, the provision at issue is a timeliness requirement. *See* 8 U.S.C. §1255a(a)(1)("applicants must apply for . . . adjustment during the 12-month period"). Consequently, it is presumptively subject to equitable tolling since that "is likely to be a realistic assessment of legislative intent . . . ." *Id.* To prevail in this case, therefore, petitioners bear the burden of affirmatively demonstrating that Congress intended IRCA's filing period not be subject to equitable modification. Petitioners have not and cannot meet this test. To the contrary, an examination of the objectives underlying IRCA reveal that equitable tolling is entirely consistent with, and indeed indispensable to, achieving those objectives.

IRCA's amnesty program had two related objectives, both of which were undermined by INS' unlawful actions. First, "in recognition that a large segment of the shadow population played a useful and constructive role in the American economy, but continued to reside in perpetual fear, the Reform Act [IRCA] established two broad amnesty programs to allow existing undocumented

aliens to emerge from the shadows" and obtain legalized status. *McNary v. Haitian Refugee Center*, ___ U.S. ___, 111 S.Ct. 888, 890 (1991). Second, Congress believed that by legalizing those undocumented aliens already within the country, INS would be free to concentrate its limited enforcement resources on controlling the border. *Id.* at 890 & n.4 (discussing H.R. Rep. No. 99-682, pt. 1, p.49 (1986)). By preventing thousands of potentially eligible applicants from applying for legalized status, petitioners frustrated both of these objectives.

Concededly, Congress did not want the legalization program to last indefinitely. But, Congress also did not anticipate that unlawful INS action would prevent thousands of potentially eligible applicants from applying during the prescribed 12-month filing period, and it never suggested that the application deadline should insulate patently unlawful INS action. Indeed, when confronted with this issue during a debate over a post-IRCA enactment, Senator Grassley stated:

> [T]he proponents [of an across-the-board extension] argue that certain court decisions recently handed down make some 75,000 persons eligible for the legalization program. *There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well-equipped to evaluate [such] equitable considerations.* The Senate need not enact a broad extension to accommodate certain litigants.

Remarks of Senator Grassley, Cong. Rec. S5401 (Apr. 28, 1988)(emphasis added).

Moreover, petitioners do not simply suggest that Congress intended the filing period to preclude meaningful relief under the circumstances of these cases. Instead, petitioners adopt the position that *under no circumstances* is IRCA's filing period subject to tolling.

Under this view, the district courts would have had no authority to enjoin INS action and extend the deadline even if INS had refused to open their offices for a single day during the entire 12-month period.

Petitioners nevertheless contend that tolling was improper because IRCA provides that the filing period shall last no longer than twelve months. That IRCA's timeliness requirement was expressed in unambiguous terms cannot, however, be the end of the inquiry. Statutory time periods are invariably expressed in mandatory and inflexible terms. Yet *Irwin* created a strong presumption in favor of tolling that operates in *all* cases, irrespective of how "stringent" the time period may be. 111 S.Ct. at 457. Indeed, *Irwin* noted that even language as stringent as that found in *Soriano v. United States*, 352 U.S. 270 (1957)("every claim . . . shall be barred unless the petition . . . is filed . . . within six years . . . "), should presumptively be subject to tolling. The Court acknowledged that this "language is more stringent than the . . . [language of other provisions]," but concluded nevertheless that "the difference . . . is [not] enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin*, 111 S.Ct. at 457.

Apparently recognizing that the presumption in favor of tolling applies even to the most stringent and explicit time provisions, *id.*, petitioners attempt to distinguish *Irwin* on other grounds. Specifically, petitioners argue that *Irwin* applies only to a "statute of limitations." Pet.Br. at 32. Although they concede that IRCA's 12-month filing period is a "timeliness requirement," *id.*, petitioners nevertheless contend that it does not fall within *Irwin*'s presumption because it is "one of the four substantive requirements for relief." *Id.* This distinction, on which petitioners' entire argument hinges, is of no consequence and is not supported by this Court's decisions.

Irwin did not limit its analysis solely to "statutes of limitation;" it referred more generally to "time limits."

See id. at 456-58. Nor are other equitable tolling decisions of this Court, of which *Irwin* was only the culmination, limited to what might be termed pure "statutes of limitation." *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)(timeliness provision is "a requirement that, *like a statute of limitations*, is subject to . . . equitable tolling")(emphasis added). Indeed, the Court's decisions make clear that whether or not a "time limit" is deemed "substantive" or "procedural" is irrelevant for purposes of tolling. *See American Pipe and Construction*, 414 U.S. at 557-58 ("the proper test is not whether a time limitation is 'substantive' or 'procedural' but whether tolling is consonant with the legislative scheme"). *See also Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1963)("classification . . . as 'substantive' rather than 'procedural' does not determine whether the . . . period may be extended"); *Glus v. Brooklyn East. Dist. Term.*, 359 U.S. 231, 234-35 (1959).[6]

[6] The government relies on a pre-*Irwin* decision, *Schweiker v. Hansen*, 450 U.S. 785 (1981), for the proposition that only a "statute of limitations" may be tolled. Pet. Br. at 32, n.34. That reliance is misplaced. First, *Hansen* did not involve a time limitation, but rather a requirement that applicants for social security benefits file a written application. Thus, *Hansen* simply did not speak to whether certain types of "time limits" fall outside of a district court's equitable tolling powers. Second, *Hansen* was an *estoppel* not a tolling case, and estoppel does not apply against the federal government where the public fisc is at issue. *See OPM v. Richmond*, 496 U.S. 414 (1990)(discussing *Hansen* and rejecting estoppel claim against the government). In contrast, one term after *Richmond* was decided, the Court in *Irwin* expressly held that "tolling" presumptively applies in suits against the government.

Thus, estoppel and tolling are fundamentally different. One important reason for this is that estoppel raises unique separation of powers concerns that are not present in equitable tolling. *See Richmond* (estoppel not permitted because, *inter alia*, "[i]f agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive"). 496 U.S. at 428.

Finally, given the reasons that prompted the *Irwin* Court to adopt a presumption in favor of tolling, petitioners' attempt to distinguish *Irwin* on the basis of subtle distinctions between various types of "time limits" is particularly inappropriate. As the Court stressed, "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 111 S.Ct. at 457.[7]

In any event, even if *Irwin* does not directly dictate the result in this case, tolling was nevertheless proper. *Irwin* did nothing more than create a *presumption* in favor of tolling. That presumption was created (as are all presumptions) because the Court recognized a general congressional intent applicable to a certain type of statutory provision -- "time limits." If the 12-month timeliness requirement is not a "time limit" as that term was used in *Irwin*, that means only that Congress' particular

[7] Petitioners also erroneously rely on IRCA's judicial review provision in support of their contention that the filing period is not subject to tolling. *See* Pet.Br. at 28-29 (*citing* 8 U.S.C. §1255a(f)). First, as Respondents' Brief explains, IRCA's specialized review provisions apply only to actual denials of individual applications and not to the present challenges. Second, Congress' decision to preclude review of untimely individual applications was prompted by its recognition that historically many *ineligible* applicants would purposefully file late in order to prolong deportation. *See* Brief for Gov't at 15-16, *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1991)(No. 89-1332)(judicial review limited because Congress "[c]oncerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program"). That concern is plainly not applicable to respondent class members who are not only eligible but who tried to file in timely fashion only to be prevented from doing so by INS.

intent in enacting IRCA must be surveyed (without the benefit of the *Irwin* presumption) in order to determine whether tolling is consistent with the Act. This is no less than the district courts did here. Indeed, *Irwin* had yet to be decided at the time the district courts issued their remedial orders. Thus, even without the benefit of the *Irwin* presumption, the district courts found that tolling was consistent with congressional intent.[8]

Finally, petitioners rely generally on *INS v. Pangilinan* and in particular on the Court's statement that courts of equity may not "disregard statutory and constitutional requirements" or "create a remedy in violation of the law." Pet.Br. at 29-31, *quoting Pangilinan*, 486 U.S. at 883. Petitioners' reliance is misplaced. Neither *amici*, nor respondents, suggest that a federal court may create a remedy "in violation of the law." Rather, the purpose of an equitable remedy is to *further* the legislative purpose. The question, therefore, is whether tolling would be inconsistent with congressional intent and thus a "violation of the law." *Pangilinan* is nothing more than a straightforward application of the principle that equitable modification must be "consonant with the legislative scheme." *American Pipe and Construction*, 414 U.S. at 557-58. The Court there examined the intent underlying the statute and concluded that Congress would not have wanted the filing period of a 1940 Act to have remained open for applicants "who filed more than 30 years after

[8] If *Irwin*'s very specific presumption in favor of *tolling* does not apply here, the general presumption that the district courts enjoy the full panoply of their equitable powers until Congress indicates otherwise continues to control. *See, e.g. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), *citing Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)("the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command").

the deadline." 486 U.S. at 884. Specifically, the Court noted both that Congress had passed later statutes evincing its intent to close the filing window for Filipino veterans, *id.*, and that despite the government's actions, thousands of Filipinos had nevertheless been naturalized. *Id.* at 885.[9]

Moreover, the Court stressed that the *Pangilinan* applicants were seeking naturalization status and that "the power to make someone a citizen . . . has not been conferred upon the federal courts as one of their generally applicable equitable powers." *Id.* at 883-84. Thus, to the extent that the federal courts have the power to confer citizenship, it must be "performed in strict compliance with the terms of an authorizing statute . . . ." *Id.* at 884. Indeed, in conferring citizenship, the *Pangilinan* district court was not sitting as a district court but as a "naturalization court" pursuant to 8 U.S.C. §1101(a)(24).

In sum, the district courts' narrowly tailored remedial orders are consistent with the decisions of this Court, which have established a strong presumption in favor of equitable tolling, and are not in conflict with *INS v. Pangilinan*.

[9] The objectives underlying IRCA and those underlying the statute at issue in *Pangilinan* are markedly different. In *Pangilinan*, Congress had one objective, to bestow a benefit on Filipino veterans who served our Nation during World War II. In contrast, IRCA was concerned with more than bestowing a benefit on deserving individuals. Congress was concerned as well that the social ills resulting from a large undocumented population be addressed and that INS not be compelled to pursue the largely futile attempt at deporting longtime undocumented residents. Thus, INS' improper implementation of the amnesty program not only harmed deserving aliens, but also undermined Congress' larger public policy of concentrating resources on more effective enforcement methods and alleviating the deleterious effects of a large "shadow population."

II. THE COURTS' POWER TO GRANT EQUITABLE RELIEF TO EFFECTUATE THE INTENT OF THE LEGISLATURE IS REFLECTED IN THE HISTORY OF THE ANGLO-AMERICAN JUDICIAL PROCESS

A. Courts Possess Authority To Employ Equitable Remedies To Implement Legislative Intent

The federal courts' traditional authority to fashion equitable remedies is reflected in the history of Anglo-American jurisprudence. The doctrine of equity recognizes that the legislature, in enacting laws, cannot anticipate all the ways in which rights may be infringed nor specify all the remedies courts should invoke to cure such unauthorized violations. As Blackstone expressed:

> [S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied in particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.

1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 61 (10th ed. 1787). Determining when such an unforeseen circumstance has occurred requires examination of legislative intent in light of the specific circumstances before the judge.[10]

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[10] As Blackstone further stated:

> Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.

2 W. Blackstone COMMENTARIES 62.

If the circumstances of the case appear to be subject to the statute, but are not expressly included, the court is acting within its equitable authority in interpreting the law flexibly and pragmatically.

The doctrines governing the equitable powers of American courts are directly descended from these English judicial principles. As developed under the English system, the essence of equity is the Chancellor's maxim, "equity regards not the form or circumstance, but the substance of the act."[11] Yet the power to grant equitable relief is also circumscribed, and effectuating the purpose of the legislature by enforcing an equitable remedy does not suggest conferring unbridled authority on the judiciary to deviate from legislative intent.

> [E]quity [is] . . . a system of positive jurisprudence . . . . [A]n essential part of its nature [is] a capacity of orderly and regular growth, a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles.[12]

Thus, as English equity doctrines stress and as this Court has emphasized, equity constitutes the implementation -- not the rejection or disregard -- of congressional intent.

> Both [courts of equity and law] . . . are equally bound and equally profess, to interpret statutes according to *the true intent of the legislature*. In general laws all cases cannot be foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the

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[11] W. Billson, EQUITY IN ITS RELATION TO COMMON LAW: A STUDY IN LEGAL DEVELOPMENT 97 (1917).

[12] 1 J. Pomeroy, EQUITY JURISPRUDENCE 48 (1986).

> letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within equity, of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law.

3 W. Blackstone COMMENTARIES 430-31 (emphasis original in part and added in part). *See* N. Singer, SUTHERLAND STATUTORY CONSTRUCTION §54.02 at 243 (1992).

In this case, the intent of Congress was to provide a 12-month period for applicants to seek legalization pursuant to eligibility criteria established by statute. In implementing IRCA, the INS adopted policies and regulations that the courts have found directly contravened the statutory standards. Indeed, the INS has not challenged those determinations. Instead, it contends that the courts should be deprived of all authority to provide a remedy to effectuate the manifest intent of Congress: a 12-month application period that maximizes both the public good and the private benefits of legalizing a large number of undocumented aliens.[13]

[13] The significance of the 12-month period is underscored by Congress' already-noted mandate that the INS undertake affirmative "outreach" to inform aliens of the eligibility requirements. The fact that Congress legislated such an outreach requirement demonstrates its awareness that the process of informing a fearful population of its rights and waiting for individuals to come forward can be lengthy. The benefit of a 12-month period was entirely eviscerated because INS adopted and publicized unlawful regulations that deterred statutorily eligible persons from applying.

B. The History Of Equity Demonstrates That Courts Have Authority To Afford Meaningful Relief That Furthers The Purpose Of Legislation

The principles of equity from which English and American law are derived have existed for centuries as a mechanism to advance legislative intent.[14] Equity developed on a functional level, in ancient Greece, as a corrective mechanism to render justice where strict application of the law rendered an unjust result. As described by Aristotle, equity is a "rectification of law where it fails through generality."[15]

Both the breadth and the limits of equity are evident from its development in England, and from its antecedents in Roman and Greek law to which the English equity system is traced. Early law, both in ancient Rome and Medieval England, was defined by custom that was only cognizant of common occurrences. The exceptional eluded it and early law elevated form over ethical considerations.[16] Equity, in contrast, based on the sovereign's grace, conscience and discretion, furthered justice. The Praetor in Rome or the Chancellor in England exercised this power as keeper of the King's conscience,[17] and from this a hard body of law emerged over three centuries.[18] Thus, transactions that were formalistically correct could be overturned by the Praetor to remedy fraud, du-

[14] W. Billson, *supra* note 11, at 4.

[15] O. Fiss, D. Rendelman, INJUNCTIONS 104 (2d ed. 1984). *See also* Aristotle, NICOMACHEAN ETHICS (Book V, Ch. 10) and RHETORIC (Book I, Ch. 13).

[16] W. Billson, *supra* note 11, at 35.

[17] W. Billson, *supra* note 11, at 16.

[18] *Id.* at 6-7.

ress, and mistake; to enforce contracts; and, most importantly, to effectuate intent and avoid elevating form over substance.[19] Similar actions by the English Chancellor evidence the influence of Roman law on our modern tradition.[20]

The Roman Praetor's equitable rules of intestate succession to vindicate the natural claims of blood relatives are an example of the equitable principle that achieving the law's intent may require employing a remedy not specified by the lawmaker. Roman customary law dictated paternal succession but was silent on intestate succession. The Praeter recognized that blood relationship was at the heart of the agnatic system and that the rules of succession gave effect to those relationships. Thus, if the child of a Roman father and a non-Roman mother had not received the fiat of the Emperor, as was necessary at law to become subject to the Roman father's power, the law did not confer the estate on the child if the father died intestate. The Praetor's rules allowed the child to receive the estate absent such formal imperial recognition[21] and recognized succession rights of the wife's family in the absence of an agnate, a practice that did not exist at law.[22] These provisions did not introduce a new form of succession. Rather, they applied the basic principle of blood relationship embod-

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[19] *Id.* at 22.

[20] *Id.* at 17-18. M. Hamburger, "Equitable Law: New Reflections on Old Conceptions," *reprinted in* 17 Social Research No. 4, at 441-42 (Dec. 1950). While common law countries have not been as heavily influenced by Roman law, Anglo-American law has adopted Roman equitable maxims.

[21] W. Billson, *supra* note 11, at 26. The Praetor would not confer benefits were burdens were not accepted. Thus, if an agnate refused the ancestral estate, the Praetor would deny the agnate rights against ancestral creditors. *Id.* at 27.

[22] *Id.* at 33.

ied in the formal provisions in a manner consistent with the law's underlying purpose.

The English tradition reveals a more fully developed set of equitable powers.[23] By the 14th and 15th centuries it became clear that the extraordinary jurisdiction of equity was needed to temper the rigidity of the common law, and the Chancellor was the natural official to reform the law.[24] By the end of the 16th century the Chancery was a separate court with common law and equity jurisdiction, the latter being the more important of the two.[25]

The Chancery created many enforcement remedies, most notably those in contract law. The common law enforced only certain types of executed contracts.[26] The Chancery, however, began operating under the principle that contracts were based on consent and that such consent should create an actionable obligation.[27] These insights affected both the common law and equity courts. The common law courts were roused to enforce simple contracts so that the Chancery did not usurp all of its jurisdiction. However, the remedy afforded by the common law courts remained restricted to damages for breach. Thus, the Chancery jurisdiction remained vital not because the concept of contract rights remained stagnant in the common law courts, but because only equity could afford a meaningful remedy, such as restitution and specific performance.[28]

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[23] *Id.* at 53.

[24] 1 W. Holdsworth, History of English Law 399 (1903).

[25] *Id.* at 409.

[26] *Id.* at 455.

[27] *Id.* at 455-56.

[28] *Id.* at 456.

While there was at times tension between the courts of law and the courts of equity, the two strands of our jurisprudence have now long been reconciled. By the latter part of the 17th century principles of equitable jurisdiction were adopted generally and were firmly in place by the beginning of the 19th century.[20] Equitable remedies to implement the intent of Congress are firmly embedded in our jurisprudence and manifest an historical, and critical, function of the courts.

In sum, the limited extensions of the application period ordered by the district courts are consistent with the history and purpose of equitable remedies. They plainly further the intent of Congress to afford aliens a full application period, they do not trench upon any public policy of Congress to the contrary, and they are tailored to provide a meaningful remedy for a legal wrong.

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[20] *Id.* at 465.

CONCLUSION

For the reasons and upon the authorities cited above, *amici* urge that the decision of the court of appeals be affirmed.

Respectfully submitted,

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No. 91-1826

IN THE
Supreme Court of the United States
OCTOBER TERM 1992

WILLIAM P. BARR, Attorney General of the United States,

Petitioner,

v.

CATHOLIC SOCIAL SERVICES, INC., et al.,

Respondents,

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

LEAGUE OF LATIN AMERICAN CITIZENS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITIES OF CHICAGO, LOS ANGELES AND NEW YORK AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CITIES OF CHICAGO, LOS ANGELES AND NEW YORK AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Chicago, Los Angeles, New York City and the District of Columbia submit this brief as amici curiae in support of respondents and respectfully request this Court to affirm the decision of the U.S. Court of Appeals for the Ninth Circuit. That Court correctly held that the district courts in the two consolidated cases (1) had jurisdiction under 28 U.S.C. § 1331(a) and 8 U.S.C. § 1329 to consider plaintiffs' challenges to Immigration and Naturalization Service ("INS") policies implementing the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, and (2) properly afforded brief, remedial extensions of the application period for adjustment of status under IRCA ("legalization") to members of the plaintiff classes.

Class members are long-term-resident, undocumented aliens who were deterred from timely application by the challenged INS policies. These policies, which imposed certain travel restrictions that limited eligibility for legalization, were invalidated by the district courts, and INS has not defended them on appeal.

Of the approximately 300,000 aliens whose immigration status is at issue in these cases, approximately 18,000 reside in each of Chicago and New York City, 100,000 in Los Angeles and 3600 in Washington, D.C.[1] The legalization of these class members is an important concern of amici. Class members and the cities will benefit substantially if eligible undocumented aliens who would already have acquired lawful residency but for the concededly illegal policies are permitted to apply for legalized status. If class members do not obtain such relief, few will voluntarily leave the country or be deported. They will continue to require governmental services and will remain in an even more exploitative underground economy, due to the possibility under IRCA of sanctions for employment of undocumented aliens.

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[1] U.S. Department of Justice, Immigration and Naturalization Service, *Report on the Legalized Alien Population* (March 1992) ("INS Report") 19. The names and locations of class members are not known to respondents, due to confidentiality provisions, but it may reasonably be estimated that their geographical distribution follows that of the already-legalized population studied in the INS Report.

Legalized status would permit presently undocumented aliens to work "on the books," pay taxes and participate in civic processes. Legalized status would also permit now-undocumented aliens to avail themselves of the protection of laws and regulations designed to eliminate substandard labor and housing conditions, the existence of which diminishes the quality of life for all urban residents. Finally, the achievement of legalized status by class members would permit their cities to secure federal support for certain expenditures on their behalf, which the cities must now bear unassisted, despite their inability to prevent the entry or force the departure of undocumented aliens.

SUMMARY OF ARGUMENT

During the stay of implementation of the district courts' extensions of the legalization period, approximately 300,000 class members have given notice that they wish to apply for legalized status. If this Court reverses the decision of the Ninth Circuit, many deserving applicants will be relegated to undocumented status.

Reversal would be inconsistent with congressional intent, since IRCA and its legislative history plainly indicate an intent to facilitate application for legalized status by all eligible, long-term-resident, undocumented aliens. Class members are no less entitled to legalization

than those who have already been legalized, and reversal will not likely lead to their deportation.

Thrusting class members back into what is now the nether world of undocumented status would be particularly injurious to the cities, where such persons disproportionately reside. Conversely, the cities would derive important and deserved benefits from the legalization of all eligible undocumented aliens in their jurisdictions.

ARGUMENT

TO IMPLEMENT CONGRESSIONAL INTENT AND AVOID THE UNWARRANTED RESULT OF RELEGATING 300,000 APPLICANTS FOR LEGALIZATION TO UNDOCUMENTED STATUS, THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS.

This brief will not address the legality of the district courts' assumption of jurisdiction and affording the remedy of briefly extending the application period for injured class members, but will discuss the necessity and appropriateness of the remedy in view of the plain language of the statute and underlying congressional intent, the unwarranted result that would flow from denying class members the opportunity for legalization and the benefits that would likely accrue to class members and amici cities if their applications are processed.

A. Due to the Stay of the Remedy, the Claims of 300,000 Class Members Are Now At Issue.

Because the pendency of this appeal and the orders staying the implementation of the brief extensions of the application period have enabled 300,000 class member

applicants to come forward, the impact of this Court's decision will be extensive. Moreover, undocumented alien class members, who were prevented or deterred from making timely applications, could not reasonably be expected to have applied for legalization until after entry of the remedial orders extending the application period for them, which occurred only after May 4, 1988, the date of expiration of the application period set by the Attorney General.

In *Barr v. CSS*, in late 1986 plaintiffs challenged INS's ruling that, to establish eligibility, an applicant for legalization must show that INS's permission had been given for any travel outside the U.S. after November 6, 1986 (J.A. 1, J.A. 28). On April 22, 1988, eight business days before expiration of the legalization application period on May 4, the district court held that the challenged policy was invalid (*see* J.A. 48, 54-74). On June 10, 1988, the court issued an opinion requiring that, to remedy the wrong, INS must accept applications from class members until November 30, 1988 (Pet. App. 22a-28a).[2]

In *INS v. LULAC*, in July 1987 plaintiffs challenged another INS travel policy, under which an undocumented alien was deemed ineligible for legalization if he or she had traveled abroad and returned to the U.S. with facially valid papers. According to INS, subsequent U.S. residence could not, as required, be viewed as illegal (J.A. 212). On July 15, 1988, two months after the May 4, 1988 deadline, the court invalidated the challenged policy (J.A. 211-34). On August 12, 1988, the court

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[2] November 30, 1988 was adopted as a convenient date, because INS was already required to accept legalization applications for certain agricultural workers, another group of undocumented aliens addressed by IRCA, until that date.

ordered, as in *CSS*, that, to remedy the wrong, INS must accept applications from *LULAC* class members up until November 30, 1988 (Pet. App. 50a-60a).

The Government appealed, in part, the decisions of both district courts only on the issue of remedy, but did not challenge the invalidation of the travel policies (J.A. 2,6).[3] Pursuant to an order in *CSS* and a stipulation in *LULAC*, implementation of the remedy ordered by the district court was, and continues to be, stayed (Pet. App. 97a-98a, J.A. 9).

Having raised the issue of jurisdiction *sua sponte,* the Court of Appeals affirmed the district court decisions on February 13, 1992 (Pet. App. 1a-21a, 956 F.2d 914), and in May 1992, the Government filed its petition for a writ of certiorari. Due to the continuing stay of implementation of the remedial extensions, the time during which eligible applicants may file has unavoidably exceeded the extension plaintiffs initially sought as necessary to undo the impact of the invalidated travel policies.

Petitioners claim that allowing consideration by INS of class members' applications at this time would be contrary to congressional intent, because Congress intended the legalization program applicable to long-term residents to "conclude more than four years ago." Pet. Reply Br. 2. The fact that the relevant application period

[3] The Government also acquiesced in the application of the courts' rulings to plaintiffs who had filed timely applications, because these plaintiffs could achieve the same relief achieved in their district court actions through administrative challenges. See Pet. Brief 11 n.11. By availing itself of the convenience of the timely filers' federal actions to avoid processing their cases administratively, the Government undercuts its present position that the district courts lacked jurisdiction of respondents' claims and demonstrates the wasteful consequences of the Government's position here on jurisdiction.

concluded in May 1988 did not mean that Congress believed that the entire legalization program, including resolution of challenges to INS rulings, would have concluded in May 1988. In any event, Congress intended in the first instance that all eligible applicants be legalized, and, to that end, that each potential applicant receive accurate information about eligibility and a sufficient time period to apply. *See*, *supra,* 7-11. This is the goal advanced by the remedial orders of the district courts. Moreover, when Congress declined to lengthen the application period for all applicants, it was recognized that improprieties such as the issuance of the concededly invalid regulations stricken by the district courts would be remedied by the judiciary. *See* Pet. App. 55a-56a n.5.

B. IRCA's Provisions and Legislative History Indicate Clear Intent to Legalize the Greatest Possible Number of Eligible Long-Term-Resident, Undocumented Aliens.

IRCA's specified application procedures plainly indicate that the legalization program for long-term-resident, undocumented aliens was designed to reach the greatest possible number of eligible applicants.

Undocumented aliens resident in the U.S. since prior to 1982 who were otherwise eligible to apply for lawful temporary residence pursuant to the applicable provisions of IRCA ("the 245A program") were to have a 12-month period to file an application. 8 U.S.C. § 1255a(a)(1)(A).[4] Applications could be forwarded to

[4] Other requirements for eligibility in the 245A program are admissibility as an immigrant, no felony and less than three misdemeanor convictions, no record of civil rights violations and registration under the Selective Service Act. 8 U.S.C. § 1255a(a)(4).

the Attorney General by a "qualified designated entity." 8 U.S.C. § 1255a(c)(1)(B). These entities were to include "qualified voluntary organizations and other qualified State, local and community organizations." 8 U.S.C. § 1255a(c)(2). The Report of the House Judiciary Committee recognized that "due to distrust of authority and lack of understanding among the undocumented population," the use of voluntary agencies "might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach services and provides for an extensive education and outreach program prior to the application period." H.R. Rep. No. 99-682(I) at 73. *See* 8 U.S.C. § 1255a(i).[5]

IRCA includes strict consent, confidentiality and use provisions, including a prohibition on the use of information relating to any applicant for any purpose other than making a "determination on the application." 8 U.S.C § 1255a(c)(3), (4) and (5). No numerical limitation on the number of eligible applicants from any area or *in toto* was imposed. 8 U.S.C. § 1255a(d)(1). *Compare* 8 U.S.C. § 1161(b)(1), 8 U.S.C. § 1160(a)(2)(c) (numerical limitation imposed on replacement agricultural workers allowed to apply for amnesty under IRCA). Finally, undocumented aliens who were prima facie eligible to apply for legalization under the 245A program were not to be deported before the beginning of and

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[5] In recommending extensive outreach efforts and the use of voluntary agencies to process applications, the Select Commission on Immigration and Refugee Policy ("Select Commission"), which conducted a 19-month study of the problem, stated that these measures would "encourage the maximum participation of qualified undocumented/illegal aliens in a legalization program." House and Sen. Comm. on the Judiciary, 97th Cong., 1st Sess., *U.S. Immigration Policy and the National Interest*, Final Report 81 (Mar. 1, 1981) ("*U.S. Immigration Policy*").

during the application period and were to be permitted to work. 8 U.S.C. § 1255a(e).

The manifest congressional purpose in establishing the carefully crafted 245A application procedure was to encourage as many applications as possible through (1) an extensive outreach program, (2) a lengthy application period, (3) the establishment of trustworthy intermediaries between INS and potential applicants, (4) the requirement of strict confidentiality, (5) the absence of any numerical limitation and (6) stays on deportation and interim work authorizations. *See Perales v. Thornburgh*, 967 F2d 798, 813 (2d Cir. 1992).[6]

The goal of attracting as many eligible applicants as possible through the 245A program is also plainly expressed in the legislative history of the statute. The Report of the House Judiciary Committee states:

> The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. . . . However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.

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[6] In supporting the prohibition of deportation of, and granting of interim work authorization to, eligible applicants prior to and during the legalization program, a Protestant community representative stated that the provision sent "two important messages," one of which was "that the intent of this program is indeed to legalize all who are eligible." Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Judiciary Comm., 99th Cong., 1st Sess. 94 (Statement of Dale De Haan, Director, Church of World Service).

> Continuing to ignore this situation is harmful to both the United States and the aliens themselves. . . . The Committee believes that the solution lies in legalizing the [status] of aliens who have been present in the United States for several years, recognizing that past failures to enforce the immigration laws have allowed them to enter and to settle here.
>
> . . . .
>
> The Committee strongly believes that a one-time legalization program is a necessary part of an effective enforcement program and that a generous program is an essential part of any immigration reform legislation.

H.R. Rep. No. 99-682 (I) at 49, *relied upon in McNary v. Haitian Refugee Center, Inc.*, 498 U.S. ___, 111 S. Ct. 888, 891 n.4 (1991) ("*McNary*"). *See also* H.R. Rep. No. 99-682(I) at 71.

Further describing the intended breadth and spirit of IRCA's legalization program, the Report reiterates:

> The Committee intends that the legalization program should be implemented *in a liberal and generous fashion* . . . . Such implementation is necessary to ensure true resolution of the problem and to ensure that the program will be a one-time-only program.

Id. at 72 (emphasis added).

IRCA's relevant statutory sections and legislative history indicate no congressional concern about unmanageable numbers of applicants in the 245A program or intent to reach only a portion of the eligible population.[7] Specifically, 8 U.S.C. § 1255a(f)(1), the interpretation of which is at issue here, which prohibits district court review of "a determination respecting an application for adjustment of status," reflects only an intent to channel review of individual denials of adjustment of status through agency and court of appeals proceedings rather than through the district courts. It was not designed to limit the number of successful 245A applicants. *McNary, supra.*

C. The Plaintiff Classes Deserve Legalization, and Reversal Will Not Result in Their Departure.

Class members are no less deserving of relief than those formerly undocumented aliens whose status has already been legalized in the 245A program.[8] At this stage, class members are more deserving of legalization, and will suffer a greater loss, if relegated to undocumented status. This is particularly so since employer sanctions may now be imposed under IRCA for the hiring of undocumented aliens. *See McNary,* 111 S. Ct. at 895.

As of enactment of IRCA on November 6, 1986, Congress provided that continuous residence in the U.S.

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[7] Granting relief to additional applicants would not "work a substantial expansion of the program ordered by Congress," Pet. 21 n.23, as the Government argues. The 245A program had no numerical limit and was designed to attract as many eligible applicants as possible.

[8] According to INS, more than three million people applied for legalization under IRCA, about 1.8 million under the 245A program and 1.3 million in the companion program applicable to certain agricultural workers. INS Report at 5. Also according to INS, "the overwhelming majority of the applicants were approved for temporary resident status," 94 percent in the 245A program at issue here, and 93 percent in the program for agricultural workers. *Id.*

for an approximately five-year period (since prior to January 1, 1982) entitled an undocumented alien to apply for legalized status in the 245A program. As of this filing, a class member will have to have been a continuous resident of the U.S. for over ten years to enable successful application. Congress considered long-term residence with consequent development of family and community ties as the critical factor in establishing the eligibility requirements for 245A legalization. With the passage of time during this litigation, class members have only become more qualified in that respect.

The INS Report shows that undocumented aliens have positive social characteristics. A higher proportion of already-legalized aliens were in the labor force than estimated for the general U.S. population (83 as opposed to 77 percent, respectively). INS Report at x. The unemployment rate for the legalized population is 3.5 percent as opposed to 5.5 percent for U.S. residents in general. *Id.* There is no reason to believe that the plaintiff class members do not share the same characteristics as the already-legalized group. The only factor that differentiates class members is that they were deterred by INS from having made a timely application due to the existence of INS's concededly invalid travel policies. That distinction does not indicate, and the Government has not argued, that the plaintiff class members are, as a consequence, any less suitable for legalization.[9]

If class members do not receive relief, they are likely to remain in the U.S. illegally, a result that will accomplish nothing in terms of congressional objectives underlying IRCA. Congress specifically recognized that the only alternatives to legalizing undocumented aliens through the 245A program, "intensifying interior enforcement or attempting mass deportation[,] would be both costly, ineffective, and inconsistent with our immigrant heritage." H.R. Rep. No. 90-682(I) at 49. Moreover, since the intent of IRCA was to redirect INS's enforcement efforts from the interior to the borders, there is no likelihood that class members will be deported. Since enforcement alternatives were rejected by Congress as infeasible and inhumane, and ignoring the long-term-resident, undocumented alien population was plainly deemed unacceptable by Congress's very enactment of IRCA, failing to allow application for legalization by class members would frustrate congressional intent in establishing the 245A program.

[9] While the Government has maintained that many class member applications are fraudulent, Pet. App. 62a, 66a-68a, that fact has not been established, since the applications have not been fully considered. In any event, the fact that, *arguendo*, some class member applications may be fraudulent does not mean that none should not be processed, as the Government maintains.

D. Legalization of Eligible Aliens Would Provide Critical Support to Class Members and Municipalities.

Since 84 percent of the population already legalized in the 245A program resides in large metropolitan areas, INS Report at 19, approximately 250,000 class members are urban residents. Affirmance would, therefore, bring substantial benefits to many urban areas in our nation and, at the same time, mitigate the devastating effects of undocumented status on aliens who are not legalized, yet will not likely abandon or be deprived of their residence in this country.

The benefits of legalization to undocumented aliens have been summarized by INS, with the "most important benefit given to successful applicants [for legalization being] documentation permitting them to work legally in the United States." INS Report at vii. As the Report

notes, undocumented "workers . . . formerly may have been handicapped in the labor market by their illegal status, or in some cases exploited because of it. . . ." *Id.* at 6. As INS aptly summarizes the effects of the program, "Legalization [has] brought [undocumented aliens] 'out of the shadows' and opened opportunities in the mainstream of American life." *Id.* at 7.

(i) Legalization Enables Long-Term-Resident Aliens to Participate in Critical Civic Functions.

Legalization of class members will improve the quality of life for all urban residents by enabling those aliens who have established family and community ties in the cities to contribute to and participate fully and freely in all civic processes. A vigorous citizenry, conscious of its responsibilities and rights, and ready to undertake and assert them, respectively, is critical to the civic health of our cities and our country. As the Select Commission concluded, "The existence of a fugitive underground class is unhealthy for society as a whole and may contribute to ethnic tensions." *U.S. Immigration Policy* 11.

Undocumented aliens are loath to report criminal acts to law enforcement authorities and to testify about criminal acts. *U.S. Immigration Policy* 72. Legalization eliminates one basis for their fear of assisting in maintaining law and order in financially beleaguered and crime-plagued metropolitan areas. Legalized status also assists in preventing undocumented aliens from being victimized by criminals who know that they fear contact with government. *See McNary,* 111 S. Ct. at 891.

Legalized status is the first step to citizenship, a prerequisite for voting and serving on juries. Enabling class members to progress toward citizenship was a result intended by Congress, and the benefits of class members'

full involvement in these fundamental civic functions need not be belabored.

Another benefit of legalized status is an increased willingness by wage earners to formalize employment records and to pay taxes. Legalization permits workers to move out of exploitative jobs, many of which are "off the books" and generate no tax revenue. Even for those undocumented aliens who have paid taxes, moreover, legalization permits the regularization of Social Security records, so as to assure proper allocation of credits. INS Report vii, 7.

(ii) Legalization Enables Long-Term-Resident Aliens to Assert Rights to Protection from Exploitation.

Enabling undocumented aliens to legalize their status will also enable them to assert their rights to be free from exploitation in the workplace, in the housing market and in the sale of consumer goods and services. *See* 132 Cong. Rec. H9709 (daily ed. Oct. 9, 1986) (statement of Rep. Rodino) ("undocumented persons must keep all contacts with governmental authorities to an absolute minimum").

Undocumented aliens are far more likely than members of the general U.S. population to be victimized by unfair labor practices. About ten percent of the legalized population reported being paid below the federal minimum wage when they applied for legalized status. INS Report at 40. The analogous figure for all U.S. workers is two percent. *Id.* Thirteen percent of employed legalized aliens reported to INS that they worked more than 40 hours per week, but were not paid time-and-a-half for those additional hours. *Id.*

By eliminating an opportunity for exploitation of a population fearful of asserting its rights, to the detriment

of all Americans in the job market, *see* Alien Adjustment and Employment Act of 1977: Hearings on S. 2252 Before the Senate Judiciary Comm., 95th Cong., 2d Sess. 202, 203 (statement of Ray F. Marshall, Secretary of Labor), legalization would benefit all workers. As the House Judiciary Committee noted in supporting the passage of IRCA, the following testimony was received from the NAACP:

> Our branches across the country, particularly in large cities, report that the undocumented worker impacts the employment of blacks. Many blacks are forced from employment rolls by the undocumented worker who is hired at a subminimum wage and is at the mercy of the employer. The worker is consciously aware that he/she has no protection because of illegal status and will accept "starvation" wages to be employed in the United States.

H.R. Rep. No. 99-682 (I) at 47. The nation's job markets should not be degraded by illegal practices that limit job opportunities to persons unable to demand legal treatment. *See U.S. Immigration Policy* 41-42 ("most serious is the fact that illegality [in employment practices] breeds illegality"); State of California, Office of the Auditor General, *A Fiscal Impact Analysis of Undocumented Immigrants Residing in San Diego County* ii (August 1992) ("*Fiscal Impact Analysis*") ("undocumented immigrants displace local workers and depress overall community wage levels and consequent economic activity").

Similar potential for illegal treatment of undocumented aliens abounds in the areas of housing and consumer affairs. Crowded, dangerous and illegal housing is often the lot of undocumented aliens. In consumer transactions, undocumented aliens would be reluctant to

complain about shoddy merchandise or unfair financial practices. As in the case of labor violations, the existence of these exploitative activities pollutes community life.

(c) Legalization of Long-Term-Resident, Undocumented Aliens Would Enable Federal Reimbursement for Certain Local Expenditures, Encourage the Use of Cost-Effective Preventive Care and Permit a More Accurate Census.

Legalization of undocumented aliens renders them eligible for a number of federal assistance programs for which they are currently ineligible, including Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Medicaid and Food Stamps, all of which require recipients to be citizens or have resident status. H.R. Rep. No. 99-682(I) at 19.[10]

Localities must now unfairly absorb the entire cost of providing humanitarian aid to undocumented aliens, who are often persons of limited economic means, *see* INS Report at 35. Such aid includes general emergency aid, such as food, clothing and shelter, and emergency medical or remedial educational assistance. An analysis by the Auditor General of California concerning the overall cost imposed by undocumented alien residents of San Diego County concluded that costs for social services exceeded tax and other revenues related to undocumented aliens by $146,000,000 annually; the annual net cost for services provided to undocumented aliens by the

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[10] This brief will not discuss whether a statutory waiting period would apply to class members, the exceptions to the waiting period, or the State Legalization Impact Assistance Grant program ("SLIAG"), which was designed to assist states with some of the costs for aliens legalized pursuant to IRCA. Additional appropriation would be needed to fund SLIAG, and it is not certain when assistance programs would apply to class members. *See also H.R. Rep. No. 99-682 (III)* at 28-29.

State of California was estimated at approximately $3 billion. *Fiscal Impact Analysis* xii.

Congress recognized that legalization of undocumented aliens would provide deserved financial relief to localities. Addressing a 1983 study by the New York City Health and Hospitals Corporation ("HHC"), which operates the nation's largest public hospital system, the House Judiciary Committee noted:

> The study found that HHC hospitals treat roughly 7000 undocumented aliens as short-stay (under 90 days) patients each year, over 80 percent of whom are admitted through the emergency rooms. Half of these patients (51%) are pregnant women, most of whom have not received adequate prenatal care and have come to the hospital to give birth or resolve a complication of pregnancy. The study estimated that the HHC hospitals lose about $18 million each year in Medicaid revenues solely because of the immigration status of its short-stay alien patients. Obviously, these are funds that must be made up by local taxpayers.

H.R. Rep. No. 99-682 (IV) at 13. *See also St. Joseph's Hospital and Medical Center v. Maricopa County,* 142 Ariz. 94, 688 P.2d 986 (1984) (county may not deny reimbursement to hospital for emergency care for undocumented aliens).

By eliminating fear of contact with public officials, including health care workers, legalization would also encourage the use of preventive services, so as to avoid the need for the use of more expensive emergency care. *See* H.R. Rep. No. 99-682 (IV), at 7; Immigration Control and Legalization Amendments: Hearings Before the Subcomm. on Immigration, Refugees, and International

Law of the House Judiciary Comm., 99th Cong., 2d. Sess. 249 (1986).

Finally, legalization would help to assure that now-undocumented aliens are counted in the census, and that localities receive a fair allocation of federal aid based upon population. Among the programs in which aid is distributed based upon the census are Mental Health Services for the Homeless Block Grants, Community Development Block Grants, Developmental Disability Grants, Nutrition Programs for the Aging, Adult Education-State Administered Grants and Migrant Education. Executive Office of the President, Office of Management, and Budget: *Catalog of Federal Domestic Assistance* 224, 343, 347, 530, 1015, 1021 (1990).

* * *

Affirmance would further congressional purposes in enacting IRCA and deliver deserved benefits to class members and cities where they largely reside. Reversal would serve no broad national interest, since class members will revert to an even more degraded undocumented status and will not be likely either to depart or be deported.

Due to INS's ungenerous actions (1) in adopting the invalid regulations challenged by plaintiffs and (2), after conceding the invalidity of and harm to class members caused by those regulations, in challenging only the brief extensions of the application period, 300,000 applications for legalization by persons that were improperly prevented or deterred from timely filing by INS are now pending. It would be a regrettable, draconian rebuff to the long effort to achieve immigration reform, *see* H.R. Rep. No. 99-682 (I) at 51-56, which produced what was

intended to be a generous, but one-time-only, legalization program, to reverse the decision on review and approve INS's summary rejection of class members' applications, relegating to undocumented status legions of long-term-resident aliens who should have been legalized long ago.

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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IN THE
Supreme Court of the United States
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WILLIAM P. BARR,
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LEAGUE OF LATIN AMERICAN CITIZENS, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession. Its over 370,000 members come from every state and territory and the District of Columbia. Since its inception over one hundred years ago, the ABA has taken an active and direct interest in the efficient and equitable

administration of justice and conducted a wide variety of programs to improve the justice system.

The ABA also has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration laws. Numerous policy statements adopted by the ABA over the years have uniformly encouraged immigration policies which assure the consistent application of due process and access to administrative and judicial review.

Consistent with these principles and to help implement them, the ABA's policy-making House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee is made up of representatives of nine ABA entities with specialized knowledged of various areas relevant to immigration issues. Also in 1983, the ABA House of Delegates approved a Resolution that "those unlawful aliens who are now here be dealt with realistically and humanely and that those who are otherwise law-abiding be accorded a legal status." In the month that President Reagan signed into law the 1986 immigration act, the ABA established a national program to assist in the implementation of the legalization provisions, including the organization of numerous *pro bono* immigration representation efforts and the training of volunteer attorneys from the private bar to counsel legalization applicants and represent them on appeal. These interests led the ABA to submit an *amicus curiae* brief in the 1990 term in *McNary v. HRC*, 111 S.Ct. 888 (1991), favoring an interpretation of the agricultural workers' legalization (SAW) statute as permitting district court jurisdiction to hear broad-based regulatory challenges.

The ABA appears as *amicus curiae* in these cases because the question presented has serious implications for the allocation of the resources of the federal judiciary and access of parties to an effective forum for judicial review of administrative agency action. The ABA has received the consents of all parties in these cases.

SUMMARY OF ARGUMENT

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided for the legalization of those immigrants who had entered the United States unlawfully prior to January 1, 1982, and had resided continuously in the country in an unlawful status since then. In order to be eligible, aliens had to meet not only the requirements of continuous residence but also had to have been physically present in the United States since November 6, 1986, the date IRCA became effective. However, Congress created an exception to this requirement for aliens who failed to maintain continuous physical presence because of "brief, casual, and innocent absences from the United States," 8 U.S.C. § 1255a(a)(3)(B). Shortly after IRCA was passed, but before any alien had yet applied for amnesty, the INS issued rules interpreting the continuous residence and physical presence requirements so as to disqualify a large number of aliens who had traveled briefly outside of the United States. On this appeal the government erroneously contends that the federal district courts were wholly precluded from hearing challenges to these rules brought by organizational as well as individual plaintiffs by 8 U.S.C. § 1255a(f)(1) which provides that "[t]here shall be judicial review of such a denial [of an application for adjustment of status] only in the judicial review of an order of deportation under [§ 106 of the INA]." *Id.* § 1255a(f).

As demonstrated under Point I, the government is in error because these actions did not seek "judicial review of a determination respecting an application for adjustment of status" at all, and thus do not come within the bar of § 1255a(f). Only last term, this Court held that the nearly identical provisions of IRCA at 8 U.S.C. § 1160(e)(1)-(3) which provided for judicial review of determinations under IRCA's farmworker amnesty program applied "*only* to review of denials of individual . . . applications," *McNary v. Haitian Refugee Center, Inc.*,

498 U.S. ——, 111 S.Ct. 888, 897 (1991) (emphasis added) rather "than a group of decisions or a practice or procedure employed in making decisions." *Id.*

Similarly, the plain language and legislative history of the statute demonstrate that Section 1255a(f) was intended to apply only to individual appeals of a "determination" on an amnesty application and not to agency rulemaking or claims asserting system-wide defects in the process by which determinations are made. Single-tier judicial review provisions, of the kind the petitioners envisage, that vest jurisdiction in a court of appeals are traditionally viewed as a means of achieving efficiency by eliminating a layer of review in cases where the trial court would do little more than duplicate either the agency factfinding or the judicial appellate function. No such duplication is involved in these cases, where the administrative record that would be developed in the proceedings before the agency would not inform the appellate court's consideration of the issues presented by a rule challenge. That inquiry would necessarily focus on the information available to the agency at the time the regulation was adopted, not on the facts of any individual case.

The government's interpretation of Section 1255a(f) would also have the effect of requiring amnesty applicants, often proceeding without counsel, to assert due process procedural and substantive claims on a case-by-case basis. Insofar as they may raise agency-wide practice and policy issues affecting those similarly situated in thousands of cases, these cases would be far more efficiently dealt with as class actions. As argued under Point II, the government's own statistics demonstrate the burdens on the judiciary that would result are unmitigated by any benefits to the parties and do not warrant judicial legislation to read into a statute that which is neither express nor intended.

ARGUMENT

I. AGENCY RULE-MAKING IS NOT "A DETERMINATION RESPECTING AN APPLICATION" AND THEREFORE THE JUDICIAL PRECLUSION PROVISION OF 8 U.S.C. § 1255a(f) DOES NOT APPLY TO THESE CASES.

Either the INS policy directives and interpretative rules issued prior to the beginning of the application period constitute "a determination respecting an application" or they do not.[1] If they do not constitute "a determination respecting an application," then the judicial preclusion provision of 8 U.S.C. § 1255a(f) simply does not apply in these cases. This Court's decision in *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1991), construing the nearly identical judicial review provision at 8 U.S.C. 1160(e), appears to answer this question decisively:

> [W]e hold that § 210(e) applies *only* to review of denials of individual . . . applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired . . . 111 S.Ct. at 897 (emphasis added).

In other words, "a determination respecting an application" refers only to the determination to grant or deny *a particular application*. A regulation is not a single act which decides the merits of an individual applicant's case; rather it is a rule or practice which is employed in making decisions in many applicants' cases.

The government's insistence that a rule is "a determination respecting an application" is contrary to well es-

[1] We respectfully refer the Court to the Petitioners' Appendix ("Pet. App."), the Respondents' Brief in Opposition, and the briefs of the parties for the full text of Section 1255a(f) and other relevant statutory provisions, and for detailed statements of the background of this case.

tablished principles of administrative law. The Administrative Procedure Act clearly differentiates a "rule" under 5 U.S.C. § 551(4) and an "adjudication" under 5 U.S.C. § 551(7). In fact, agency rule-making is specifically excluded from the definition of adjudication under the APA. 5 U.S.C. § 551(6) and (7).[2] To read "a determination respecting an application" as encompassing both rule-making and adjudication would lead to the anomalous result that the administrative appellate authority mandated by Section 1255a(f)(3)(A) would have the power to entertain facial challenges to the regulations themselves. Certainly Congress did not envision that the INS Legalization Appeals Unit (LAU) would undertake the administrative review of the Attorney General's regulations promulgated after notice and comment. Yet that is the ironic consequence of the government's position.[3]

[2] Petitioners' own regulations make it clear that the words "a determination respecting an application" refer to the process of adjudication, not to rule-making. 8 C.F.R. § 245a.1(e) defines the term "to make a determination" as obtaining and reviewing all information required to *adjudicate* an application for the benefit sought and making a decision thereon." (emphasis added).

[3] The government's reliance on the word "respecting" to justify its broad reading of "a determination respecting an application" is inconsistent with Congress' interchangeable use of that phrase with "the determination on the application" in Section 1255a(f)(3). Paragraph (3)(A) establishes administrative appellate review of "a determination described in paragraph (1)," which is the paragraph containing the term "a determination *respecting* an application for adjustment of status." *Id.* Section 1255a(f)(3)(A), (f)(1) (emphasis added). Paragraph (3)(B) states that "[s]uch administrative appellate review"—signalling by the word "such" that the review is of a "determination *respecting* an application"—"shall be based on the administrative record established at the time of the determination *on* the application." *Id.* Section 1255a(f)(3)(B) (emphasis added). In short, Congress provided for review of a determination "respecting" an application, based on the record established "on" the application. Clearly, the "determination" in (f)(3)(B) is the same determination referred to in (f)(3)(A). This conclusion is underscored by the use of the definite article in (3)(B): '*the* determination on *the* application." *Id.* (emphasis added). The juxtaposition of the two phrases, coupled with use of the word "the" to indicate that the same determination and the same application are being referred to, compel the conclusion that Congress saw no difference between a determination "respecting" an application and a determination "on" an application.

The statutory scheme also supports the view that only review of individual applications, not rule making, is limited by Section 1255a(f). Section 1255a(f) follows immediately after several subsections dealing with adjudication of individual applications. The general rule-making authority under which the challenged INS regulations were issued appeared in the following subsection, which has no review provisions in it. 8 U.S.C. § 1255a(g).

Moreover, as this Court has noted with respect to the nearly identical review provisions found in the legalization program for agricultural workers, "the 'abuse of discretion' standard of judicial review . . . would make no sense" if the Reform Act were to be read as requiring constitutional and statutory challenges to INS procedures to be subject to its specialized review provision:

> Although the abuse-of-discretion standard is appropriate for judicial review of an administrative adjudication of the facts of an individual application for SAW status, such a standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts. The language of § 210(e)(3)(B) thus lends substantial credence to the conclusion that the Reform Act's review provision does not apply to challenges to INS's practices and procedures in administering the SAW program.

McNary v. HRC, supra 111 S.Ct. at 897. The same argument applies with equal force to the language of Section 1255a(f)(4)(B).

Thus, the plain language of Section 1255a(f) places the statute squarely within the class of jurisdiction-preclusion provisions that are traditionally viewed as warranted only in circumstances where district court fact-finding would unnecessarily duplicate an adequate ad-

ministrative record—circumstances that are not present either in "pattern and practice" cases where district court factfinding is essential or statutory challenges to agency rule-making where the administrative record of the particular case is essentially irrelevant. *See McNary supra*, 111 S. Ct. at 898-899.

The United States Code is replete with similar provisions, all of which have in common the definition of a specific agency order based on a record that it would be wasteful to duplicate in a district court.[4] The traditional rationales for this kind of restriction on judicial review are conservation of judicial resources and efficiency of administrative process. Vesting jurisdiction to review agency orders in the court of appeals under these statutes is simply a means of eliminating one layer of review in situations where a trial court would do little more than duplicate either the agency factfinding or judicial appellate function:

> [A]dministrative agencies, particularly in discharging quasi-judicial adjudicating functions, perform much the same functions with respect to the courts of appeals as do district courts. Evidence is heard, a record is prepared and sifted, issues are identified and resolved. Frequently, indeed, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge or hearing examiner, and resolution by a collegial body. The questions open for judicial review are commonly questions of law or review of the record for substantial evidence to support the administrative decision—matters as to which a district court would play the same

[4] A partial illustrative list is provided in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3941 (1977), which cites approximately 60 such provisions, ranging from orders of the Administrator of the Environmental Protection Agency with respect to the registration of poisons and pesticides, 7 U.S.C. §§ 135b(d), 136n(4), to actions of the United States Commissioner of Education in acting on state plans for community services program grants, 20 U.S.C. § 1008.

> role as a court of appeals. Review initially by a district court, and then by a court of appeals, would impose added burdens of delay on the administrative process, and of delay and expense on the parties.

16 C. Wright, A Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3940, at 302 (1977).

The burdens imposed by two-tier judicial review of administrative determinations—as distinguished from two-tier review of challenges to the process by which such determinations are made—are described in *Polcover v. Secretary of the Treasury*, 477 F.2d 1233 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). There, district court review of a claim of wrongful discharge of a federal employee was limited to the record made by the Civil Service Commission, and the district court was required to apply the same standards of review as the court of appeals. The court of appeals criticized the

> [d]uplication, delay, expense and despair for the employee-litigant [that] are inherent in such a system. The interposition of the district court serves . . . no viable purpose [where] the record before us is identical to that [which] had already been made at the administrative level and presented to] the district court.

477 F.2d at 1227.

Such would be the response were plaintiffs here simply seeking to arrogate to the district court the narrow role ascribed to the court of appeals in Section 1255a(f)—if, for example, the district court were asked to review the application of the INS regulations to the facts of a particular case. At issue on this appeal, however, is an entirely different claim: whether the district court has jurisdiction to entertain challenges to the rules and procedures under which whole classes of determinations are made.

This Court has consistently recognized the distinction, for the purpose of jurisdiction preclusion, between appeals from a documented administrative decision and challenges to the process by which the determination is made. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (statute that limits review of "any determination . . . of . . . the amount of benefits . . . simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than *determinations* themselves"); *Christian v. New York State Dep't of Labor*, 414 U.S. 614, 622 (1974) ("the fact that the . . . agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination:); *see also Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975), *California Dep't of Human Resources v. Java*, 402 U.S. 121 (1971). In *UAW v. Brock*, 477 U.S. 274 (1986), this Court rejected the same argument echoed here by petitioners—that the limitation on review of "*a determination*. . . with respect to entitlement to program benefits" contained in § 2311(d) "irrevocably commits to state processes *all claims* relating to TRA entitlements." *Brock* at 284 (emphasis added). Unlike the situation in *Heckler v. Ringer*, 466 U.S. 602 (1984), where the claims of the plaintiffs, although couched in procedural language, were "at bottom, a claim they should be paid for their BCBR surgery," the injunctive relief ordered by the district courts at issue here does not dictate the outcome of any particular case.[5] Because the INS

[5] The distinction between *Heckler v. Ringer*, the case heavily relied upon by petitioners here, and these cases is obvious. In *Ringer*, the Court held that Ringer's cause of action—namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act—constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad terminology employed in 42 U.S.C. § 405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

McNary, supra, also pointed out that had Congress intended the judicial review provisions of IRCA to encompass challenges to INS procedures and practices, it could have easily used broader statutory language such as the general grant of district court jurisdiction under Title II of the INA at 8 U.S.C. § 1329 ("all causes . . . arising under any of the provisions") or 38 U.S.C. § 211(a) which governs review of veterans' benefits claims ("all questions of law and fact"). 111 S.Ct. at 897.

[6] *Bowen* was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Physicians, a non-profit corporation, was *entitled* to challenge a Medicare regulation in district court since § 405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

must readjudicate applications which were based on invalid regulations, it is not thereby obliged to rule in any particular applicant's favor.

Even if the judicial preclusion provisions of IRCA were as broad as those in *Ringer*, the presence of the organizational plaintiffs in these cases makes *Ringer* inapposite. *Bowen v. Michigan Academy of Physicians*, *supra*, found that the review provisions at issue in *Ringer* simply do not apply to an organization of physicians challenging a regulation in district court. 476 U.S. at 667.[6] The same logic applies to the organizational plaintiffs here who (like the Michigan Academy of Physicians) will never have claims capable of being processed through the stand-

ard statutory review procedures. Just as the Michigan Academy was not challenging an "amount determination," the organizations bringing these lawsuits are not seeking review of "a determination respecting an application."

The government's interpretation that agency rulemaking constitutes "a determination respecting an application" would consign each individual applicant to a drawn-out and ultimately fruitless administrative appeals process solely for the purpose of preserving the applicant's statutory claims should his or her case ever reach the court of appeals in the context of a review of an order of deportation. Then, and only then, after the case had been considered by the LAU, the immigration judge and the Board of Immigration Appeals, could the applicant raise the validity of the underlying regulations. Even then, the potential for review of such claims as are raised here is largely illusory. Because judicial review is limited under the statute to the administrative record established at the time of the review by the LAU, Section 1255a(f)(4)(B), the limitations on "the record" would prevent a hearing of such claims or their effective remedy for all those similarly affected.

The "record" would generally consist of no more than a completed application form, a report of medical examination, any evidence by way of documents or affidavits that the applicant meets the residence requirements, and notes if any, taken on a form worksheet by an INS interviewer at the time of an initial application—all related in any given case to a single legalization applicant. *See* 8 C.F.R. §§ 245a.2(d), 245a.(e)(2) and (3). This "administrative record" stands in stark contrast to the type of administrative record normally considered by the courts in determining the validity of an agency's regulations. In deciding *McNary v. HRC, supra*, the majority opinion recognized that, in the absence of district court factfinding, the administrative record in individual determinations could not have addressed the pattern of INS' allegedly discriminatory practices at issue there:

> As the American Bar Association as amicus points out, statutes that provide for only a single level of judicial review in the courts of appeals "are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential [given the inadequate administrative record]." Brief for American Bar Association as Amicus Curiae 7. It therefore seems plain to us, as it did to the District Court and the Court of Appeals, that restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.

111 S. Ct. at 898-899. Contrary to the implication in the government's brief, these cases do not involve deference to "agency expertise." Neither the LAU and the immigration judge, nor the BIA, has any authority to consider the merits of the applicants' statutory claims.[7]

Equally daunting is the prospect that, if not allowed to pursue their statutory claims in district court, many

[7] *See Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1332 n.7 (D.C. Cir. 1989) *vacated and remanded for further consideration in light of McNary*, 111 S.Ct. 1068 (1991) ("[f]acial challenges to the regulation [in a proceeding before the LAU] are not permitted"); *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) ("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations . . . any more than there is authority to consider constitutional challenges to the laws we administer.") *See also*, 8 C.F.R. § 103.3(a)(3)(iii). Moreover, it is the judiciary, not the administrative agency, which is the final authority on issues of statutory construction and congressional intent. *See e.g. Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, n. 9 (1984).

individual applicants would never be able, as a practical matter, to obtain meaningful judicial review of their objections to the INS regulations.[8] Because there is no provision for direct judicial review of the denial of legalization status unless the alien is later apprehended and placed in deportation, most aliens can ensure themselves review in the courts of appeals only if they voluntarily surrender themselves for deportation. As this Court noted in *McNary*, "that price is tantamount to a complete denial of judicial review for most undocumented aliens." 111 S.Ct. at 898. *See also Rusk v. Cort*, 369 U.S. 367 (1962)[9] Even if the alien were to present himself for arrest and deportation solely to obtain review of his statutory claims,

[8] Of course, under the petitioners' approach, the aliens who were turned away or otherwise discouraged from filing because the challenged INS regulations made them ineligible would never be able to obtain *any* review of the underlying policy because there could never be "a determination" as to them. Petitioners' approach would also preclude judicial review of claims by legalization applicants who were denied statutory employment authorizaiton during the six to seven monthly period *prior to the start of the application period* on the ground that, under an allegedly unlawful INS legalization policy, they could not establish a *prima facie* or nonfrivolous claim for legalization. *See* 8 U.S.C. § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a nonfrivolous case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period) . . ."). Under petitioners' construction, the wholesale denial of employment authorization to such aliens during the pre-application period could *never* be remedied, despite the obvious irreparable injury, because no legalization application had yet been denied.

[9] In *Rusk*, this Court granted independent federal review to a person contesting his loss of citizenship notwithstanding the review procedures set out in 8 U.S.C. § 1503(b) and (c). Because these latter provisions required a person living abroad to "travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen," 369 U.S. at 376, this Court found that the provisions did not preclude the broad remedial provisions of the APA.

as the government suggests, the INS could refuse, at its unfettered and unreviewable discretion, to institute the deportation proceedings which are a prerequisite to review under the statute.[10]

Under petitioners' theory, the district director, who alone may invoke deportation proceedings, would have the ultimate power to place INS altogether beyond the constraints of judicial review, no matter how unlawful its actions may be, simply by choosing not to institute deportation proceedings against those affected.[11] Nothing in the language of the statute warrants a result so completely at odds with this Court's strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. *See also, Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This presumption not only originates in the Administrative Procedure Act, *Abbott Laboratories*, 387 U.S. at 140, but in the very

[10] Nothing in the INA or its regulations provides a way for an alien to trigger the initiation of deportation proceedings against himself. Generally, every proceeding to determine the deportability of an alien is commenced by the filing of an order to show cause with the Office of the Immigration Judge. *See* 8 C.F.R. § 242.1 (providing for the issuance of an order to show cause by one of a list of enumerated officials). The decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not reviewed by either the immigration judge or the BIA. *Matter of Ramirez-Sanchez*, 17 I&N Doc. 503 (BIA 1980); *Matter of Mercid*, 14 I&N Doc. 644 (BIA 1974), *aff'd mem.*, 514 F.2d 1070 (5th Cir. 1975); *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[11] It is not contested on this appeal that the INS interpretation of IRCA's "brief, casual and innocent" provision and "continuous residence" requirement were erroneous. Thus, the record in these cases itself provides a proper basis to determine that deference to "agency expertise" would be misplaced.

foundation of the Court's power to maintain judicial review. *Bowen*, 476 U.S. at 670 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). The petitioners' expansive reading of "respecting" in the administrative and judicial review provision of Section 1255a(f) ignores this strong presumption favoring judicial review and would require the statute to be applied in a manner inconsistent with its language, structure and purpose, its legislative history and the class-nature of the actions before this Court.

II. DIVESTING DISTRICT COURT'S OF FEDERAL QUESTION JURISDICTION OVER CHALLENGES TO AGENCY RULE-MAKING DEPRIVES THE PARTIES AND THE JUDICIARY OF THE EFFICIENCIES OF CLASS ACTION LITIGATION.

The government's interpretation of Section 1255a(f) would preclude amnesty applicants from proceeding as a class under Fed. R. Civ. P. 23 ("Rule 23"). The government's position would thus require amnesty applicants who allege injury from system-wide agency abuses to seek relief on a case-by-case basis and an inadequate record in the federal appellate courts in the context of individual deportation orders. A sense of the overwhelming burden this would impose on the parties and courts is provided by the INS' own statistics.

According to INS statistics, as of December 1, 1991, 3,033,179 applications for temporary resident status had been filed under IRCA, of which 216,018 applications had been denied and 155,109 remained pending. Statistics Division, Office of Strategic Planning, U.S. Immigration and Naturalization Service, *Provisional Legalization Application Statistics*, December 1, 1991. While the potential workload for the INS, the BIA and the courts of appeal which these numbers entail is enormous, the numbers would have been truly staggering had the district courts not properly exercised their jurisdiction to address

system-wide abuses in INS's administration of the legalization programs.[12]

INS statistics show that during the period 1984 through 1990, federal circuit courts managed to review an average of 345 orders of deportation per year under Section 106, leaving an average of 849 cases pending at each year-end. *1990 Statistical Yearbook of the Immigration and Naturalization Service*, 186. During this period the actual number of cases reviewed actually decreased from 494 in 1984 to 264 in 1990. *Id.* There is no question that hun-

[12] *See e.g. HRC v. Nelson*, 694 F.Supp. 864 (S.D. Fla. 1988), *aff'd sub nom. McNary v. HRC*, 498 U.S. ——, 111 S.Ct. 888 (1991) (enjoining unlawful INS procedures for adjudicating SAW applications); *Ayuda, Inc. v. Meese*, 687 F.Supp. 650 and 700 F.Supp. 49 (D.D.C. 1988), *rev'd* 880 F.2d 1325, 948 F.2d 742 (D.C. Cir. 1991) *petition for cert. pending*, No. 91-1924 (enjoining INS regulation that denied eligibility under "known to the government" standard of 8 U.S.C. § 1255a(a)(2)(B) to persons whose unlawful status was known to agencies other than the INS or whose unlawful status resulted from failure to file periodic address reporting forms); *Farzad v. Chandler*, 670 F.Supp. 690 (N.D. Tex. 1987) (same re known to other agencies); *Immigrant Assistance Project v. INS*, 709 F.Supp. 998 and 717 F.Supp. 1444 (W.D. Wash. 1989) (same re address reporting forms); *Zambrano v. INS*, No. 8-88-455 (E.D. Cal. 1988), *aff'd* —— F.2d. —— (9th Cir. August 19, 1992) (enjoining INS regulation that denied eligibility to aliens if an immediate family member received "public cash assistance"); *Vargas v. Meese*, 682 F.Supp. 591 (D.D.C. 1987) (enjoining INS regulation requiring SAW applicants filing within the United States to have entered country before June 26, 1987); *see also Perales v. Thornburgh*, 967 F.2d 798 (2nd Cir. 1992) (district court had jurisdiction over challenge to INS "public charge" regulation); *Doe v. Nelson*, 703 F.Supp. 713 (N.D. Ill. 1988) (court has jurisdiction over challenge to INS regulation barring legalization applications unless they are filed within 30 days after start of application period); *United Farmworkers v. INS*, No. 87-1964-LKK/JFM (E.D. Cal. 1988) (settlement of challenge to INS procedures for adjudicating SAW applications in parallel case to *McNary v. HRC* for Northern and Western regions of INS). In many of these cases, the INS either entered into settlement agreements as to one or all of the claims asserted or did not appeal the merits as to one or more such claims.

dreds of thousands of aliens have legalization claims affected by the INS policies at issue in these cases and the cases cited *supra* at p. 17 n. 12. If all of the INS denials based on regulations which the district courts have determined to be unlawful were channeled into case-by-case review, appeals to the circuit courts of only a small fraction of those denials would flood the courts with many times the number of all cases that were decided over the seven year period of 1984-1990.

The inefficiencies inherent in this prospect are not mitigated by any benefit to the parties. To the contrary, the failure of legalization applicants to obtain relief on a case-by-case basis is in striking contrast to the success achieved in class actions. "The LAU remanded about ninety percent of the appeals it received in 1989, mostly because of court orders [in district court class actions] requiring the INS to correct deficiencies in adjudicating SAW applications," 2 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 47.02(8)(i), at 47-36 & n.267 (rev. ed. 1990). Indeed, not only does the LAU lack the authority to rule on challenges to INS regulations, but our review of circuit court opinions does not reveal a single instance to date in which a legalization applicant successfully obtained circuit court review of INS regulations through an individual appeal under section 1255a(f).[13]

The statutory claims that the government would relegate under Section 1255a(f) to case-by-case review are also directly analogous to claims asserted in *Califano v. Yamasaki*, 442 U.S. 682 (1979). There, this Court rejected government objections to certification of a class of plaintiffs challenging certain procedures under the Social Security Acts as violative of due process. In *Yamasaki*, as in the present case,

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[13] Nearly four years after the application period ended, we found only one reported case in which an applicant was successful in reversing a LAU decision through an individual appeal under Section 1255a(f). *See Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990).

> [t]he issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class . . . . It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting many [applicants] to be litigated in an economical fashion. . . .

442 U.S. at 701.

As set forth in *Yamasaki*, this Court requires "a clear expression of Congressional intent" to "indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action is otherwise permissible." *Id.* at 700. The legislative history of IRCA reveals no such intent. To the contrary, Congress rejected a version containing a judicial review provision that explicitly barred class actions.[14] "Few princi-

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[14] The rejected Senate version provided that there would be "no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien . . ." S. 1200, 99th Cong., 2d Sess. § 202(f)(1985). Since "this section" in that bill included a provision authorizing the Attorney General to promulgate regulations necessary for the legalization program, *Id.* § 202(a)(1), the Senate restriction would have precluded review of rule-making. Indeed, the Senate report accompanying S. 1200 stated that the preclusion attached to "a decision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). By contrast, the House Committee Report stated that the language ultimately adopted by Congress provided for limited administrative and judicial review of *denials of applications for legalization*. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 74 (1986). Thus, when the Senate agreed to the House language which, on its face, limited only the judicial review procedure for determinations *respecting an application*, it should be clear that it was receding from a broadly worded preclusion to a much narrower one.

ples of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). The legislative history reflects, moreover, that Congress sought to "ensure that fair administrative reviews are conducted by the INS and to provide for the complete considerations of all possible evidence to determine legalization" without "unduly burden[ing] to Government or the applicants with an excessively complex process," 130 Cong. Rec. 17229 (daily ed. June 20, 1984) (Remarks of Rep. Mineta).[15] These concerns are consonant with a limitation on review on individual applications without *sub silentio* displacing the policies embodied in Rule 23 and embraced by this Court—and with the realities of how issues are raised and preserved in "pattern and practice" cases.

The most frequently recognized benefit of the class action is avoidance of duplicative suits and the concomitant increased court efficiency in the administration of litigation. The Rules Advisory Committee in commenting

[15] Moreover, Congress created IRCA's judicial review provisions against a well-established background of existing case law holding that 8 U.S.C. § 1105a does not preclude broad-based statutory and constitutional challenges brought as class actions. *See, Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1232-33 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986). When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change, *Id.*

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. § 1105a—without further restriction or of change to that section—establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.

on the 1966 amendments to Fed. R. Civ. P. 23 stressed the judicial economies and procedural convenience of class actions: "[the Rule] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

This Court, as well, has recognized that class certification advances "the efficiency and economy of litigation which is a principal purpose of the procedure." *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982). *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) ("A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filings of repetitious papers and motions.")

Class actions provide significant benefits to defendants as well as plaintiffs:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, [and] the provision of a convenient and economical means for disposing of similar lawsuits . . .

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963).

Commentators also recognize the particular utility of the class action procedure in civil rights litigation:

> Groups which find themselves unable to achieve their stated objectives through the ballot frequently turn to the Courts . . . [They help make] possible the distinctive contribution of a minority group to the ideas and beliefs of our society [and provide an] avenue open to a minority to petition for the redress of grievances.

Note, Development in the Law, Class Actions, 89 Harv. L. Rev. 1318 (1976). Judge Weinstein has observed that "[t]he impact of class actions in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member." Weinstein, *Some Reflections on the 'Abusiveness' of Class Actions*, 58 F.R.D. 299 (1973) (remarks before the Fifth Judicial Circuit Symposium on Class Actions).

Judge Weinstein's remarks are particularly apt in the context of IRCA's programs. Nearly four years after the application period ended, only a handful of applications have reached the courts of appeals. Assuming, for the sake of argument, that an individual applicant were able to obtain meaningful relief in the court of appeals by means of the review set forth in Section 1255a(f), at this juncture a decision invalidating an INS regulation would have no prospective effect. Each applicant affected by the regulation in question would still have to pursue his or her case in the court of appeals.[16]

It is also significant that, as of August 15, 1992, only 9.8 percent of all amnesty applicants were represented by counsel, while 69.6 percent proceeded *pro se*. The remaining 20.5 percent were not represented by legal counsel, *pro bono* or otherwise, but by temporary agencies created by voluntary groups called Qualified Designated Entities ("QDE"). Letter of Michael D. Hoefer, Chief

[16] In *Ayuda, Inc. v. Thornburgh, supra*, the District of Columbia Circuit noted that the INS would not be obliged to acquiesce in one circuit's interpretation of a statutory term under IRCA in other circuits that had not decided the question and might not even be required as a matter of law to acquiesce in an unfavorable ruling when future cases arose in the same circuit court of appeals. 880 F.2d at 1330-31, n.4. The Ninth Circuit has also suggested that the INS has the right to nonacquiesce intracircuit. *See Castillo-Felix v. INS*, 601 F.2d 459, 467 (9th Cir. 1979). *See generally* Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 Yale L. & Pol'y Rev. 430 (1991).

Demographic Statistics Branch Statistics Division, to Attorney Bruce Goldstein dated September 2, 1992 (Annexed hereto as Appendix A). Many QDE's no longer exist or are unavailable to assist in processing individual appeals. This reinforces another benefit of the class action which is clearly relevant here: an "effective utilization of finite sources of legal help." 1 H. Newberg, *Newberg on Class Actions*, § 5.13, at 451.

An interpretation of Section 1255a(f) that divests district courts of jurisdiction to hear broad-based regulatory challenges thus unnecessarily burdens all concerned—plaintiffs, the government, the judiciary, and scarce *pro bono* counsel—by withholding the clear benefits of class certification that is otherwise appropriate under Rule 23.[17]

[17] Many of the same reasons which support the conclusion that the districts courts properly assumed jurisdiction over these cases, also provide ample support for the proposition that those courts had the power to grant effective relief by tolling the application period deadline for aliens who were thwarted or discouraged from filing applications by the Attorney General's unlawful IRCA regulations. We do not think this Court could have intended that its decision in *INS v. Pangilinan*, 486 U.S. 875 (1988) would leave these plaintiffs without a remedy simply because the district courts were unable to decide the merits of plaintiffs' challenge to the rules until the end of the 12-month statutory application period.

While an individual claim for legalization may properly be denied on the basis that the applicant did not file on time, Congress's creation of a limited application period cannot reasonably have been intended to preclude federal courts from issuing an appropriate remedial order after finding that the INS regulations violated IRCA and that the unlawful regulations had the direct effect of denying applicants any reasonable opportuniy to exercise their statutory rights in a timely fashion. As this Court has said, "once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("Congress intends the executive to obey its statutory commands and . . . expects the courts to grant relief when an executive agency violates such a command.") Tolling the application

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decisions of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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period deadline is fully consistent with the overall congressional purpose to encourage the maximum number of undocumented aliens "to emerge from the shadows" and apply for legalization.

APPENDIX

APPENDIX

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

425 Eye Street N.W.
Washington, D.C. 20536
September 2, 1992

Bruce Goldstein
Farmworker Justice Fund, Inc.
2001 S Street, N.W., Suite 210
Washington, DC 20009

Dear Mr. Goldstein:

This is in response to your request of August 17, regarding the number of pre-82 legalization applicants who used the services of a lawyer. I have updated information since I last spoke with Ms. Poplawski so I am also including information for Special Agricultural Workers in the table listed below.

Legalization Applicants by Type of Representation
As of August 15, 1992

Representation	Pre-82	SAW
Total	1,763,434	1,277,514
Self	1,184,747	932,377
Attorney	222,784	49,964
Qualified Designated Entity (QDE)	340,442	284,130
Attorney and QDE	15,461	11,043

Source: Legalization Application Processing System.

If I can be of further assistance or if you have any questions please contact me at (202) 376-3066.

Sincerely,

/s/ Michael D. Hoefer
MICHAEL D. HOEFER
Chief
Demographic Statistics Branch
Statistics Division